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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

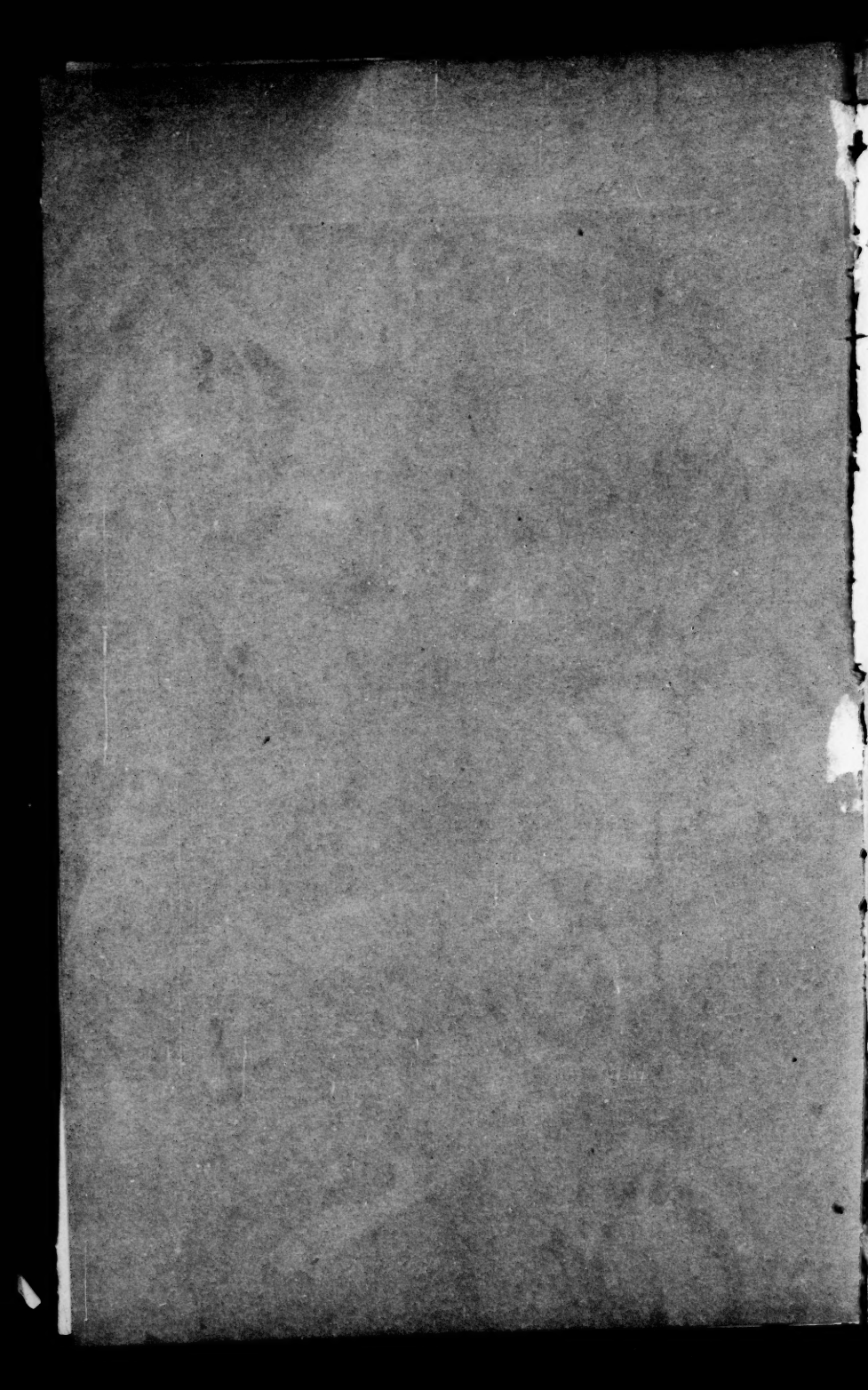
OCTOBER TERM, 1890.

No. 11.—ORIGINAL.

EX PARTE: IN THE MATTER OF JEFFERSON WILSON, PETITIONER.

RETURN TO RULE.

FILED MARCH 25, 1891.



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## EX PARTE: IN THE MATTER OF JEFFERSON WILSON PETITIONER.

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### RETURN TO RULE.

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INDEX.


| | | Original. | Print. |
|---|---|---|---|
| Petition for writ of habeas corpus | | 1 | 1 |
| Exhibit A. | Indictment | 7 | 4 |
| B. | Judgment | 10 | 5 |
| Rule to show cause | | 12 | 6 |
| Certificate to petition and rule | | 13 | 6 |
| Return to rule | | 14 | 7 |
| Exhibit A. | Transcript of record | 16 | 7 |
| | Order for grand jury | 16 | 7 |
| | Order for special venire | 16 | 7 |
| | Challenge of grand jury, etc | 18 | 8 |
| | Indictment | 20 | 10 |
| | Order granting time to plead | 22 | 11 |
| | Order taking plea and demurrer under advisement | 23 | 11 |
| | Order setting cause for hearing | 23 | 11 |
| | Order for continuance | 24 | 12 |
| | Order for grand jury | 24 | 12 |
| | Order for special venire, etc | 24 | 12 |
| | Challenge of grand jury | 26 | 13 |
| | Indictment | 28 | 14 |
| | Demurrer to indictment | 30 | 15 |
| | Appearance and arraignment | 31 | 16 |
| | Trial and verdict | 32 | 16 |
| | Order denying motions for new trial, etc | 33 | 17 |
| | Judgment | 33 | 17 |
| | Order for grand jury | 35 | 18 |
| | Order for special venire | 36 | 19 |
| | Indictment | 37 | 19 |
| | Arraignment | 39 | 21 |
| | Clerk's certificate | 41 | 21 |

1 In the Supreme Court of the United States—In the matter of the application of Jefferson Wilson for a writ of habeas corpus.

*To the honorable the Supreme Court of the United States:*

Your petitioner, Jefferson Wilson, respectfully shows to your honors that he is a citizen of the United States, of African descent; that he is now imprisoned and restrained of his liberty in the county jail, in the city of Phœnix, the county of Maricopa, Territory of Arizona, by one R. H. Paul, United States marshal for the Territory of Arizona; that the cause of his said confinement, imprisonment, and restraint of his liberty is as follows, to wit:

That heretofore, and on the 24th day of May, 1890, your petitioner was indicted by a purported grand jury consisting of only fifteen persons, impaneled and sworn as a grand jury to inquire into all offenses against the laws of the United States, in the second judicial district of the Territory of Arizona. Said grand jury was and had been theretofore impaneled and sworn in the district court of the second judicial district of the Territory of Arizona, a court then and there sitting in the city of Phœnix, county of Maricopa, Territory of Arizona, and then and there having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States;

2 That said second judicial district is and was then composed of the counties of Maricopa, Yuma, Pinal, and Gila, of said Territory.

That your petitioner was accused by said indictment, jointly with one Primus Douglas, of the crime of murder, in the alleged killing of one William Fleming, a negro man, on or about the 26th day of August, 1889, upon the White Mountain Indian Reservation, in the county of Gila, and within said second judicial district, a copy of which said indictment is hereto attached, marked Exhibit "A," and made a part of this petition. That thereafter, and on the 27th day of May, 1890, when this defendant and the said Primus Douglas were called to plead to said indictment, they filed in said court the following objections to said indictment:

First. That the grand jury which found said indictment had no legal authority to inquire into the offense charged in said indictment;

Second. That the above-entitled court has no jurisdiction, as appears upon the face of said indictment, of the offense charged or to try said cause;

Third. That the facts set forth in said indictment do not constitute a public offense against the United States or the laws thereof;

Fourth. That the matters contained in said indictment constitute a legal bar to the prosecution of the alleged offense in the above-entitled court.

That each and all of said objections were overruled by the court, and that your petitioner then entered his plea of not guilty to said indictment. And that thereafter, and on the 27th day of May, 1890, your petitioner was put upon trial before a jury on said indictment in said court.

That thereafter, and on the 29th day of May, 1890, said jury returned a verdict against your petitioner in said cause of "guilty of murder in the first degree."

That said grand jury and said trial jury were summoned by the said United States marshal from the body of said judicial district at large, and not by the sheriff of Gila County from the body of said county.

That your petitioner was tried upon said indictment in said court, sitting as a United States court, and not as a Territorial district court, and was prosecuted by the United States attorney for the Territory of Arizona, and not by the prosecuting officer of said Gila County.

That thereafter, and on the 12th day of June, 1890, said district court, sitting as aforesaid, sentenced and adjudged your petitioner upon said verdict of guilty to be hanged for said alleged offense by the said marshal of the United States. And the said R. H. Paul, United States marshal for said Territory, now imprisons and restrains your petitioner of his liberty in the jail aforesaid under and by virtue of said judgment and sentence of said court, for the purpose of executing your petitioner under and by virtue of said sentence of death, a copy of which said sentence and judgment is hereto annexed, marked Exhibit "B," and made a part hereof.

That your petitioner has been informed by his counsel, O. T. Rouse and W. M. Lovell, and he believes, and therefore alleges, that his said imprisonment and the said restraint of his liberty is illegal; that the illegality of his said imprisonment consists in this: That said alleged crime is charged in said indictment to have been committed on the White Mountain Indian Reservation, in the county of Gila, Arizona Territory, and not in the county of Maricopa, where your petitioner was indicted, tried, convicted, and sentenced; that the grand jury which found said indictment and the trial jury which tried said cause were summoned by R. H. Paul, United States marshal, from the body of the second judicial district, and not by the sheriff of Gila County; that the said
4 alleged crime is charged as having been committed on the White Mountain Indian Reservation, in the county of Gila; that the alleged crime was not an offense against the laws of the United States; that the United States courts have not exclusive jurisdiction over the place where the alleged crime is charged to have been committed, and that said court, sitting as a United States court, had no jurisdiction to try your petitioner on said indictment; that the grand jury which found said indictment was composed of only fifteen persons, and not of seventeen nor more than twenty-three persons, as required by law; that said grand jury of fifteen persons was impaneled by said district court (sitting as and exercising the jurisdiction of a United States court) under the provisions of the Revised Statutes of Arizona of 1887, which provide that a grand jury shall consist of not less than thirteen nor more than fifteen persons.

That the Fifteenth Legislative Assembly of said Territory convened according to law on the 21st day of January, 1889; that thereafter and while duly in session, and on the 12th day of March, 1889, and within sixty days from the commencement of said session, said legislative assembly passed a law repealing the grand-jury law of 1887, and enacting instead thereof a law providing that a grand jury shall consist of not less than seventeen nor more than twenty-three persons; that said law so passed by said legislative assembly was duly delivered to the governor of said Territory for his approval, as required by law, on the 12th day of March,

1889, and within sixty days from the commencement of the said session of said legislative assembly; that said act was not approved by said governor; that sixty consecutive days of the calendar from the commencement of the said session of said legislative assembly expired on the 21st day of March, 1889; that said legislative assembly continued in
5 session after the expiration of sixty such days up to the 10th day of April, 1889; that only forty-nine of the calendar days embraced in the period covered by the said legislative session were in any part used or consumed as legislative days; that said act remained in the hands of said governor unapproved by him from said 12th day of March, 1889, when the same was delivered to him, for a period of more than ten days (Sundays excepted), and while said legislative assembly continued in session; and that said act thereby became a law without the approval of the governor; and that said grand jury, not having been impaneled in accordance therewith, was illegally constituted in this: that it consisted of only fifteen persons instead of not less than seventeen nor more than twenty-three persons, as required by said act of said legislative assembly; and that it had no power or authority in law to find or present said indictment against your petitioner.

Wherefore your petitioner prays that a writ of habeas corpus be issued in his behalf and directed to him, the said R. H. Paul, United States marshal for Arizona, directing him, the said marshal, to have the body of your petitioner before your honorable court at a time and place therein to be specified, to do and to receive what then and there shall be considered by your honors concerning him, together with the plan and cause of his detention, and said writ, and that your petitioner be restored to his liberty.

Dated this 23d day of December, 1890.

JEFFERSON WILSON.

Witness to signature:
FRANK C. KIBBEY.

J. ALTHEUS JOHNSON,
*His Attorney in U. S. Supreme Court.*
O. T. ROUSE and W. M. LOVELL,
*His Attorneys in Court below.*

6 TERRITORY OF ARIZONA,
*County of Maricopa, ss:*

Jefferson Wilson, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has heard the foregoing petition read and knows the contents thereof; and that the statements therein made he believes to be true.

JEFFERSON WILSON.

Witness to signature:
FRANK C. KIBBEY.

Subscribed and sworn to before me this 23d day of December, 1890.
[SEAL.] J. H. STOUT,
*Clerk District Court 2d Judicial District,*
*Territory of Arizona.*

(Endorsement.)

I admit the facts stated in the within petition, but deny the conclusions of law.

H. R. JEFFORDS,
*U. S. Attorney for Arizona*

7 EXHIBIT "A."

In the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

In the district court of the second judicial district of the Territory of Arizona, the 24th day of May, one thousand eight hundred and ninety.

UNITED STATES OF AMERICA )
*vs.*
PRIMUS DOUGLAS AND JEFFERSON WILSON. )

Primus Douglas and Jefferson Wilson, accused by the grand jury of the United States of America, chosen, selected, and sworn within and for the second judicial district of the Territory of Arizona, in the name and by the authority of the United States of America, by this indictment, of the crime of murder, committed as follows: The said Primus Douglas and Jefferson Wilson, late of the second judicial district aforesaid, heretofore, to wit: On the 26th day of August, A. D. one thousand eight hundred and eighty-nine, and within the said second judicial district of the Territory of Arizona, and within and upon the White Mountain Indian Reservation in the second judicial district aforesaid, and within the county of Gila,
8 in said Territory of Arizona, unlawfully, wilfully, feloniously, and of their malice aforethought, with force and arms, did make an assault in and upon one William Fleming, and they, the said Primus Douglas and Jefferson Wilson, then and there, with a certain piece of iron which he, the said Jefferson Wilson, in both his hands, then and there had and held, and with a certain club which he, the said Primus Douglas, in both his hands, then and there had and held, the said William Fleming, in and upon the head of him, the said William Fleming, then and there, unlawfully, feloniously, wilfully, and of their malice aforethought, did strike, giving unto him, the said William Fleming, then and there, with the said piece of iron and with the said club by the strokes aforesaid, in manner aforesaid, in and upon the head of him, the said William Fleming, several mortal wounds, of which said several mortal wounds he, the said William Fleming, on the 26th day of August, eighteen hundred and eighty-nine, in and upon the said White Mountain Indian Reservation, in the county of Gila aforesaid, and in the second judicial district aforesaid of the Territory of Arizona aforesaid, died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Primus Douglas and said Jefferson Wilson, in the manner and form aforesaid, and at the time and place aforesaid, did, then and there unlawfully, feloniously, willfully, and of their malice aforethought, kill and

murder him, the said William Fleming, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HARRY R. JEFFORDS,
*United States Attorney for the Territory of Arizona.*

[Endorsed]: No. 137. In the district court, —— judicial district,
9 Territory of Arizona. United States of America vs. Primus Douglas and Jefferson Wilson. Indictment. A true bill: Harry B. St. Clair, foreman of the grand jury. Indictment No. ——. Witnesses examined before the grand jury; Letcher Hardenian, Wm. Worman, Wm. Adams; Wm. H. Abenderth, Edwin Given, Charles Fields, Sam'l James, H. C. Jones, Wm. C. Jones, Harry Jeffords, Samuel Humphries, Dand Lillie, Val. Hopkins, Madison Veil, Mrs. Lizzie Veil, Levy Bradley, Tom Davenport, George Parker, Frank Try, Lt. J. W. Watson, Rowdy, an Indian.

Presented to the court in the presence of the grand jury by their foreman and filed this 24th day of May, 1890. J. H. Stout, clerk.

TERRITORY OF ARIZONA,
*County of Maricopa, ss:*

I, J. H. Stout, clerk of the district court, second judicial district, Territory of Arizona, hereby certify that the annexed copy of an indictment is a true, full, and complete copy of the indictment against Primus Douglas and Jefferson Wilson, returned and filed in this office on the 24th day of May, A. D. 1890.

In witness whereof I have hereunto set my hand and the seal of said court this the 23d day of December, 1890.

[SEAL.] J. H. STOUT, *Clerk*,
By FRANK C. KIBBEY, *Deputy*.

10 EXHIBIT "B."

United States of America, district court, second judicial district of Arizona, having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the district and circuit courts of the United States.

May term, A. D. 1890.—Thursday, June 12, 1890.

UNITED STATES OF AMERICA, PLAINTIFF,
*against*
JEFFERSON WILSON, DEFENDANT. } No. 137.

*Convicted of murder.*

Be it remembered that on the 12th day of June, A. D. 1890, the same being a term day of said court, Hon. Joseph H. Kibbey, judge, presiding, the following proceedings, among others, were had in the above-entitled cause:

The defendant being present in open court in person and by his counsel, O. T. Rouse and W. M. Lovell, and the United States attorney, H. R.

Jeffords, and assistant United States attorney, Calvert Wilson, present on the part of the United States, this being the time heretofore fixed for passing judgment on the defendant in this case, the defendant, Jefferson Wilson, was duly informed by the court of the nature of the indict-
11 ment found against him for the crime of murder committed on the 26th day of August, A. D. 1889, of his arraignment and plea of not guilty as charged in the indictment, of the trial and the verdict of the jury on the 29th day of May, A. D. 1890; the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment, that whereas you, Jefferson Wilson, having been duly convicted in this court of the crime of murder, it is therefore ordered, adjudged, and the judgment and sentence of the court is that you, Jefferson Wilson, be taken by the marshal of the said Territory of Arizona to the county jail of Maricopa County, or to some other convenient place in the second judicial district of this Territory, and within a time in the manner to be fixed by law, and there suffer death by hanging by the neck until you are dead.

The defendant was then remanded into the custody of the marshal.

JOSEPH H. KIBBEY,
*Judge.*

TERRITORY OF ARIZONA,
*County of Maricopa, ss:*

I, J. H. Stout, clerk of the said court, do hereby certify the foregoing to be a true and correct copy of the judgment duly made and entered on the minutes of said court in the above-entitled action, and the whole thereof.

Attest my hand and seal of said court this 23d day of December, A. D. 1890.

[SEAL.] J. H. STOUT,
*Clerk.*

12 Supreme Court of the United States.—October term, 1890.

Ex parte: In the matter of Jefferson Wilson, petitioner.—On petition for a writ of habeas corpus.

On consideration of the petition of Jefferson Wilson, it is now here ordered by this court that cause be shown by R. H. Paul, United States marshal for Arizona, before this court, at the city of Washington, on the 9th day of March, 1891, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of habeas corpus should not issue as prayed in said petition.

February 2, 1891.

13 Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing are true copies of the petition for a writ of habeas corpus and the rule to show cause granted thereon in

the case of Ex parte: In the matter of Jefferson Wilson, petitioner, No. 11, or'g'l, October term, 1890, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 7th day of February, A. D. 1890.

[SEAL.]

JAMES H. MCKENNEY,
*Clerk of the Supreme Court of the United States.*

14 In the Supreme Court of the United States, October term, 1890.

Ex parte: In the matter of Jefferson Wilson, petitioner.—On petition for a writ of habeas corpus.

*To the honorable The Supreme Court of the United States:*

The return of R. H. Paul, United States marshal for the Territory of Arizona, to the rule to show cause why a writ of habeas corpus should not issue, as prayed in said petition.

In obedience to the rule hereto annexed, to show cause why a writ of habeas corpus should not issue, as prayed in said petition, I do hereby certify and return to the Supreme Court of the United States that before the coming to me of the annexed rule to show cause the said Jefferson Wilson was committed to my custody, and is detained by virtue of the judgment and sentence of the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the district and circuit courts of the United States, holden at Phœnix, in the second judicial district of the Territory of Arizona—May term, 1890—Thursday, June 12, 1890, to me directed, a copy of which annexed, I transmit to you, together with a certified copy of the entire record

15 of the case, marked "Exhibit A."

Nevertheless, I will have the body of the said Jefferson Wilson before you whenever commanded so to do.

Tucson, Arizona, March 18, 1891.

R. H. PAUL,
*United States Marshal for the Territory of Arizona.*

16 EXHIBIT A.

In the district court of the second judicial district of the Territory of Arizona, November term, 1889. Hon. Joseph H. Kibbey, judge, presiding.

Be it remembered, that on the 30th day of November, A. D. 1889, the same being a regular term day of said court, the following order, among others, was made by said court:

[Minute book 3, page 234.]

*Order for grand jury.*

It appearing to the court necessary and proper that there should be a grand jury in attendance upon court at this term thereof:

It is ordered that the clerk issue a venire, directed to the marshal of the Territory of Arizona, commanding him to summon from the body of the

district, and not from bystanders, fifteen (15) persons, electors, duly qualified to serve as grand jurors, and that they be summoned to appear at the court-house in Phœnix, on Tuesday, the 10th day of December, 1889, at nine o'clock a. m. of said day.

JOS. H. KIBBEY, *Judge.*

And be it further remembered, that on the 20th day of January, 1890, the same being a regular term day of said court, the following proceedings, among others, were had.

[Minute book 3, page 245.]

On the venire heretofore issued the marshal returned as duly
17 summoned from the body of the district, and not from bystanders, the following-named persons to serve as grand jurors at this term of the court, to wit: Sam. F. Webb, Charles Goldman, George D. Tantau, Andrew J. Halbert, T. C. Jordan, James Stinson, Wm. Barnett, John H. Pomeroy, E. R. Scarborough, A. J. Hoskins, A. F. Barker, A. J. Doran, W. C. Truman, Charles A. Fisk, and James F. Patton, who were called by the clerk, and all answered to their names except George D. Tantau and James Stinson, reported sick, and A. F. Barker, excused.

The court ordered the clerk to issue a special venire, directed to the marshal of the Territory of Arizona, commanding him to summon from the body of the district, and not from bystanders, three (3) electors, qualified to serve as grand jurors, and that they be summoned to appear at the court-house at the hour of one o'clock p. m. of this day.

At one o'clock p. m. the marshal returned as duly summoned on the special venire the following-named electors, qualified to serve as grand jurors, to wit: W. B. Cox, W. B. Lount, and George F. Coats, who appeared and answered to their names.

The following-named defendants, being in custody, were brought into court by the marshal, viz [among others]:

Primus Douglas, charged with murder,

Jefferson Wilson, charged with murder.

Owen T. Rouse, esq., appeared as attorney for defendants Primus Douglas, Jefferson Wilson [among others].

The grand jury was sworn as to their qualifications; Henry Garfias was sworn as interpreter, and the several defendants above named were duly informed by the court of their right of challenge to the grand jury.

The grand jury was then examined on voir dire by the United States attorney for the prosecution, and by the court and O. T.
18 Rouse, esq., for the several defendants.

Grand Juror Charles A. Fisk was challenged by the U. S. attorney on the ground of bias and prejudice in cases of Primus Douglas, Jefferson Wilson, and Wm. Varnum, charged with murder, and the case of David Edwards, charged with conspiracy; which challenge was tried by the court and allowed, and Grand Juror Chas. A. Fisk instructed by the court not to be present at or take part in the consideration of the charges against said defendants or the deliberations of the grand jury thereon.

Now comes David Edwards, Primus Douglas, Jeff. Wilson, William Varnum, and F. C. Wolgast in person and by O. T. Rouse, their attorney,

and state that they are each held to answer before the grand jury of this court for crimes alleged to have been committed in said second judicial district and cognizable in said court, and challenge said grand jury for the reasons:

1st. That the names of the members of this jury were not put on a list and ballots thereof deposited in a jury box and drawn therefrom in the presence of the proper officers or in the presence of anyone.

2nd. That their names were not deposited in any box or drawn from any box.

3rd. That they were summoned by order of the court on a venire ordered before a list of persons qualified to serve as jurors had been made and deposited in a jury box, and without the names of said jurors being drawn from any jury box.

4th. That the following-named, Charles A. Fisk, A. J. Doran, James F. Patton, reside in the second judicial district, but not in Maricopa County, and that they were each summoned in the county in which he resides, and not in the said county of Maricopa.

5th. That the names of said A. J. Doran, Charles A. Fisk, and James F. Patton were not on any list of persons selected to serve
19 as jurors in said county of Maricopa, and their names were not drawn from any jury box to serve as jurors in said county.

O. T. ROUSE,
*Attorney for Edwards, Douglas, Wilson, Varnum, and Wolgast.*

Comes now the United States, by its attorney, H. R. Jeffords, and denies that the facts above alleged constitute a ground of challenge and denies the facts alleged in said challenge.

H. R. JEFFORDS,
*U. S. Attorney.*

Which said challenge to the grand jury was tried by the court and denied. To which ruling of the court the said defendants, David Edwards, Primus Douglass, Jeff. Wilson, William Varnum, and F. C. Wolgast, by their attorney, then and there duly excepted.

A. J. Doran was appointed and sworn as foreman of the grand jury and the grand jury sworn and instructed by the court as to their duties.

John Earl was sworn as bailiff for the grand jury and jury retired.

And be it further remembered, that on the 27th day of January, 1890, the same being a regular term day of said court, the following proceedings, among others, were had, to wit:

[Minute book 3, page 264.]

Hon. Jos. H. Kibbey, judge, presiding.

The grand jury came into court, were called by the clerk, and all answered to their names. On being asked by the court if they had any presentments to make, presented through their foreman indictments as follows [among others]:

Against Primus Douglass and Jefferson Wilson, for murder.

20 A true copy of which is as follows, to wit:

In the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>*vs.*<br>PRIMAS DOUGLASS AND JEFFERSON WILSON, | In the district court of the second judicial district of the Territory of Arizona, the 27th day of January, one thousand eight hundred and ninety. |

Primas Douglass and Jefferson Wilson are accused by the grand jury of the United States of America, chosen, selected, and sworn within and for the second judicial district, Territory of Arizona, in the name and by the authority of the United States of America, by this indictment, of the crime of murder, committed as follows:

The said Primas Douglass and Jefferson Wilson, late of the second judicial district aforesaid, heretofore, to wit, on the 26th day of August, A. D. one thousand eight hundred and eighty-nine, and within the said second judicial district of the Territory of Arizona, and within and upon the San Carlos Indian Reservation, in the second judicial district aforesaid, and within the county of Gila, in said Territory of Arizona, unlawfully, willfully, feloniously, and of their malice aforethought, with force and arms, did make an assault in and upon one William Fleming, and they, the said Primas Douglass and Jefferson Wilson, then and there, with a certain piece of iron, which he, the said Jefferson Wilson, in both his hands then and there had and held, and with a certain club which he, the said Primas Douglass, in both his hands then and there had and held, the said
21 William Fleming, in and upon the head of him the said William Fleming then and there unlawfully, feloniously, willfully, and of their malice aforethought did strike, giving unto him, the said William Fleming, then and there with the said piece of iron and with the said club, by the strokes aforesaid, in manner aforesaid, in and upon the head of him the said William Fleming, several mortal wounds, of which said several mortal wounds he, the said William Fleming, on the 26th day of August, eighteen hundred and eighty-nine, in and upon the said San Carlos Indian Reservation, in the county of Gila aforesaid, and in the second judicial district aforesaid, of the Territory of Arizona aforesaid, died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Primas Douglass and said Jefferson Wilson in the manner and form aforesaid and at the time and place aforesaid did then and there unlawfully, feloniously, willfully, and of their malice aforethought, did kill and murder him, the said William Fleming, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

HARRY R. JEFFORDS,
*United States Attorney for the Territory of Arizona.*

[Endorsed:] No. 130. In the district court, second judicial district, Territory of Arizona. United States of America vs. Primas Douglass

and Jefferson Wilson. Indictment. A true bill. A. J. Doran, foreman of the grand jury. Indictment No. ——.

Witnesses examined before the grand jury: Dr. Mann, Samuel James, Chas. Fields.

Witnesses examined before the grand jury: Lt. J. W. Watson, Wm. Varnum, Wm. Adams, W. H. Abendroth, Sam. Humphreys, Levi Braidley, Harry Jeffords, W. C. Jones, Madison Veile, David Edwards, Letcher Hardeman, Henry Kirby, David C. Robinson, Edward Guinn,
22 Bird Baker, Mrs. Domingo McIntosh. Presented to the court in the presence of the grand jury by their foreman, and filed this 27 day of January, 1890.

J. E. WALKER, *Clerk.*

The grand jury reported that twelve or more of their number had concurred in finding the said indictments, and having finished their labors, the grand jury submitted their final report and were discharged from further attendance upon the court. The said indictments were then and there filed by the clerk.

And be it further remembered that on the 28th day of January, the same being a regular term day of said court, the following proceedings, among others, were had:

130. UNITED STATES OF AMERICA, *vs.* PRIMUS DOUGLAS AND JEFFERSON WILSON. } Murder.

The defendants were brought into court in the custody of the marshal. O. T. Rouse, esq., attorney for defendants, and Harry R. Jeffords, esq., U. S. attorney, present.

The defendants were arraigned by the clerk reading to them the indictments, and presenting them with a true copy of the same. On being asked by the clerk if Primus Douglas and Jefferson Wilson were their true names, they each replied "It is my true name." On being asked if they plead guilty or not guilty they took the statutory time to plead.

Whereupon the court ordered that the said defendants have one day in which to plead.

23 And be it further remembered that on the 29th day of January, 1890, the same being a regular term day of said court, the following proceedings, among others, were had:

The defendants, Primus Douglas and Jefferson Wilson, present in open court in person, and by their attorney, O. T. Rouse, esq.; Harry R. Jeffords, U. S. attorney, present. The said defendants filed their plea in abatement and demurrer to the indictment, which was presented to the court by counsel and by the court taken under advisement.

[Minute Book 3, page 275.]

130. UNITED STATES OF AMERICA *vs.* PRIMUS DOUGLAS AND JEFFERSON WILSON. } Murder.

The defendants, Primus Douglas and Jefferson Wilson, present in open court in person, and by their attorney, O. T. Rouse, esq.; Harry R. Jef-

fords, U. S. attorney, present. The defendants interposed and filed a demurrer to the indictment, which demurrer was disallowed by the court and excepted to by defendants. The said defendants, Primus Douglas and Jefferson Wilson, were then each separately asked by the court if he pleads guilty or not guilty, whereupon the said defendants, Primus Douglas and Jefferson Wilson, each separately plead that he is not guilty of the crime charged. By agreement of the parties hereto, ordered that the case be set for trial on Monday, the 17th day of February, 1890. The defendants were then remanded to the custody of the marshal.

And be it further remembered that on the 19th day of February, 1890, the same being a regular term day of said court, the following proceedings, among others, were had:

24 Here now it is ordered by the court that all causes, motions, matters, matters and things not hereinbefore disposed of at this term of the court be, and the same are hereby, continued to the next term of this court.

Court adjourned sine die.

JOS. H. KIBBEY, *Judge.*

May term, 1890.

Hon. Joseph H. Kibbey, judge, presiding.

Be it remembered that on the 9th day of May, A. D. 1890, the same being a regular term day of said court, the following proceedings among others were had:

[Minute Book 3, page 297.]

*Order for a grand jury.*

It appearing to the court necessary and proper that there should be a grand jury in attendance upon court at this term,

Therefore, it is ordered that a grand jury of fifteen persons be summoned forthwith to attend at the May term, 1890, of the said court at Phœnix, in said district, to inquire into all offences against the laws of the United States; said jurors to be summoned according to law and be in attendance upon said court on Monday, May the 12th, 1890.

And be it further remembered that on the 19th day of May, 1890, the same being a regular term day of said court, the following proceedings, among others, were had:

[Minute Book 3, page 306.]

25 On the venire heretofore issued the marshal returned as duly summoned from the body of the district and not from bystanders the following-named persons to serve as grand jurors at this term of the court, to wit: [1] David Balz, [2] J. B. Long, [3] J. B. Kelley, [4] W. F. McNulty, [5] C. H. Vail, [6] A. J. Peters, [7] Chas. Holborn, [8] Geo. Evans, [9] H. B. St. Clair, [10] Geo. F. Coats, [11] Chas. Goldman, [12] B. J. Hawley, [13] S. C. Heineman, and [14] David Heron and [15] E. Ganz, who were called by the clerk and all answered to their names excepting Chas. Holborn, excused on account of sickness,

Geo. F. Coats, excused on account of sickness, S. C. Heineman, excused, and David Heron, excused, and David Balz. An attachment was ordered for David Balz, who was brought into court on said attachment and reprimanded by the court.

The court ordered the clerk to isssue a special venire, directed to the marshal of the Territory, commanding him to summon from the body of the district, and not from bystanders, four electors qualified to serve as grand jurors, and that they be summoned to appear at the court-house in Phœnix forthwith.

At one o'clock the marshal returned as duly summoned on the special venire the following-named electors qualified to serve as grand jurors, to wit: Lincoln Fowler, Frank Luke, W. E. Thomas, and W. M. Breakenridge, and who appeared and answered to their names.

A. J. Peters was excused by the court.

The court ordered the clerk to issue a special venire, directed to the marshal of the Territory of Arizona, commanding him to summon from the body of the district, and not from bystanders, one elector qualified to serve as a grand juror, and that he be summoned to appear at the court house in Phœnix forthwith.

The marshal returned as duly served in the 2nd special venire the following-named elector qualified to serve as a grand juror, to wit: Herbert Goldman, who appeared and answered to his name.

26 The following-named defendants, being in custody, were brought into court by the marshal, to wit (others among):

Jefferson Wilson, charged with murder.

Hon. O. T. Rouse appeared as attorney for defendants above named.

The grand jury was sworn as to their qualifications, and the above defendants were informed of their right to challenge the grand jury.

The grand jury was then examined on their "voir dire" by the United States attorney for the prosecution, and by the court, and O. T. Rouse, the attorney for the defendants.

Now comes David Edwards, Primus Douglas, Jefferson Wilson, and James Logan, by their attorney, O. T. Rouse, and challenges the grand jury for the following reasons:

That said jury was not properly drawn.

A copy of said demurrer or challenge is as follows, to wit:

In the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in circuit and district courts of the United States.

Now come David Edwards, Primus Douglass, Jeff. Wilson, William Varnum, and F. C. Wolgast, in person and by O. T. Rouse, their attorney, and state that they are each held to answer before the grand jury of this court for crimes alleged to have been committed in said second judicial district, and cognizable in said court, and challenge said grand jury for the reasons:

1st. That the names of the members of this jury were not put on a list and ballots thereof deposited in a jury box and drawn therefrom in the presence of the proper officers, or in the presence of anyone.

27 2nd. That their names were not deposited in any box or drawn from any box.

3rd. That they were summoned by order of the court on a venire ordered before a list of persons qualified to serve as jurors had been made and deposited in a jury box, and without the names of said jurors being drawn from any jury box.

Comes now the United States by its attorney, H. R. Jeffords, and denies that the facts above alleged constitute a ground of challenge, and denies the facts alleged in said challenge.

Said defendants, by their attorney, challenge Jurors Halley and Evans, upon the ground of being residents living in another county than Maricopa County; which challenges were denied by the court.

H. B. St. Clair was appointed and sworn as foreman of the grand jury, and the grand jury was sworn and instructed as to their duties and retired.

And be it further remembered, that on the 24th day of May, 1890, the same being a regular term day of said court, the following proceedings, among others, were had (Minute Book "3," page 324):

The grand jury, coming into open court were asked if they had a presentment to make, answered they had, and thereupon presented in open court the following indictments, to wit [among others]:

137 THE UNITED STATES OF AMERICA, vs. PRIMUS DOUGLAS AND JEFFERSON WILSON. } Murder.

A true copy of which indictment is in the following words, to wit:

28 In the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

In the district court of the second judicial district of the Territory of Arizona, the 24th day of May, one thousand eight hundred and ninety.

UNITED STATES OF AMERICA vs. PRIMAS DOUGLASS AND JEFFERSON WILSON. }

Primus Douglass and Jefferson Wilson, accused by the grand jury of the United States of America, chosen, selected, and sworn within and for the second judicial district, Territory of Arizona, in the name and by the authority of the United States of America, by this indictment, of the crime of murder, committed as follows:

The said Primas Douglass and said Jefferson Wilson, late of the second judicial district aforesaid, heretofore to wit, on the 26th day of August, A. D. one thousand eight hundred and eighty-nine, and within the said second judicial district of the Territory of Arizona, and within and upon the White Mountain Indian Reservation, in the second judicial district aforesaid, and within the county of Gila, in said Territory of Arizona, unlawfully, willfully, feloniously, and of their malice aforethought, with force and arms, did make an assault in and upon one William Fleming, and they, the said Primas Douglass and Jefferson Wilson, then and there, with a certain piece of iron which he the said Jefferson Wilson in both his hands then and there had and held, and with a certain club which he the said

Primas Douglass in both his hands then and there had and held, the said William Fleming, in and upon the head of him the said William Fleming, then and there unlawfully, feloniously, willfully and of their
29 malice aforethought did strike, giving unto him the said William Fleming then and there, with the said piece of iron and with the said club, by the strokes aforesaid, in manner aforesaid, in and upon the head of him the said William Fleming, several mortal wounds, of which said several mortal wounds he the said William Fleming, on the 26th day of August, eighteen hundred and eighty-nine, in and upon the said White Mountain Indian Reservation, in the county of Gila aforesaid, and in the second judicial district aforesaid of the Territory of Arizona aforesaid, died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Primas Douglass and said Jefferson Wilson, in the manner and form aforesaid and at the time and place aforesaid, did then and there unlawfully, feloniously, willfully, and of their malice aforethought did kill and murder him the said William Fleming, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

HARRY R. JEFFORDS,
*United States Attorney for the Territory of Arizona.*

(Endorsed:) No. 137. In the district court, second judicial district, Territory of Arizona. United States of America vs. Primas Douglass and Jefferson Wilson. Indictment. A true bill. Harry B. St. Claire, foreman of the grand jury. Indictment No. ———. Witnesses examined before the grand jury: Letcher Hardeman, Wm. Varnum, Wm. Adams, Wm. H. Abendroth, Edward Guinn, Charles Fields, Sam'l James, H. C. Jones, Wm. C. Jones, Harry Jeffords, Sam'l Humphreys, David Lillie, Vol. Hopkins, Madison Viele, Mrs. Lizzie Viele, Levy Bradley, Tom Davenport, George Parker, Frank Fry, Lt. J. W. Watson, Rowdy, an Indian.

Presented to the court in the presence of the grand jury by their foreman and filed this 24 day of May, 1890.

J. H. STOUT, *Clerk.*

30 The grand jury then made the following report to the court and were discharged. [Here follows the report of grand jury.]

Come now the defendants and demur to the indictment herein, which demurrer was overruled by the court. To which ruling the defendants excepted.

Which demurrer is as follows:

In the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

UNITED STATES OF AMERICA
*vs.*
PRIMAS DOUGLASS AND JEFFERSON WILSON.

Now come the above-named defendants and demur to the indictment in this case on the following grounds:

1st. That the grand jury which found said indictment had no legal

authority to inquire into the offense charged in said indictment, by reason of said offense not having been committed within the legal jurisdiction of the county of Maricopa.

2nd. That the above-entitled court has no jurisdiction as appears upon the face of said indictment of the offense charged, or to try said cause.

3rd. That the facts set forth in said indictment do not constitute a public offense against the United States or the laws thereof.

4th. That the matters contained in said indictment constitute a legal bar to the prosecution of the alleged offense in the above-entitled court.

31 That each and all of the foregoing objections and grounds of demurrer appear upon the face of said indictment. Wherefore said defendants pray that said indictment be dismissed, and that they go hence without day.

O. T. ROUSE AND
W. M. LOVELL,
*Attys. for Defendants.*

(Endorsed:) 137. In the district court, second judicial district. United States of America vs. Primas Douglass and Jefferson Wilson. Demurrer to indictment. Filed May 27, 1890. J. H. Stout, clerk. O. T. Rouse and W. M. Lovell, attys. for defdts.

And be it further remembered, that on the 27th day of May, 1890, the same being a regular term day of said court, the following proceedings among others were had:

137. UNITED STATES OF AMERICA *vs.* PRIMUS DOUGLAS AND JEFFERSON WILSON. } Appearance and arraignment.

The defendants Primus Douglas and Jefferson Wilson appeared in open court in person and represented by Counsel Rouse and Lovell, and Harry Jeffords, U. S. attorney, representing the Government.

The defendants were arraigned by the clerk reading to them the indictment and delivering to each of them a true copy of the indictment, and being asked by the clerk if Primus Douglas was his true name, said Douglas replied it was, and upon the clerk asking the said Wilson if Jefferson Wilson was his true name, he replied that it was.

The court then asked the defendants whether they plead guilty or not guilty as charged in the indictment. They were granted till the afternoon to plead at 1:30 p. m.

The defendants were then remanded.

32 At 1:30 p. m. of said day the following proceedings among others were had:

UNITED STATES OF AMERICA *vs.* PRIMUS DOUGLAS AND JEFFERSON WILSON } Murder.

Thereupon the defendants, Primus Douglas and Jefferson Wilson, plead not guilty as charged in the indictment.

[Minute Book "3," page 338.]

UNITED STATES OF AMERICA
*vs.*
PRIMUS DOUGLAS AND JEFFERSON WILSON. } Trial.

This case coming on regularly for trial and the defendants being in open court with their attorneys, and the U. S. attorney, Harry Jeffords, representing the prosecution, the defendants moved the court that they be granted separate trial. The court granted the defendants separate trials, and thereupon the defendant Jefferson Wilson was put upon his trial.

And be it remembered that on the 29th day of May, 1890, the same being a regular term day of said court, the following proceedings among others were had:

[Minute Book "3," page 352.]

UNITED STATES OF AMERICA
*vs.*
JEFFERSON WILSON.

The jury in this case coming into open court were asked by the court if they had agreed upon a verdict, said they had.

The foreman then handed the court the following verdict:

We, the jury duly empaneled and sworn in the above entitled action, do upon our oath find the defendant, Jefferson Wilson, guilty
33 as charged in the indictment.

WALTER TALBOT,
*Foreman.*

And be it further remembered that on the 12th day of June, 1890, the same being a regular term day of said court, the following proceedings among others were had:

[Page 358.]

137. UNITED STATES OF AMERICA,
*vs.*
JEFFERSON WILSON.

The defendant being in open court, comes now O. T. Rouse and W. M. Lovell, attorneys for the defendant, Jefferson Wilson, and moves the court to set aside the verdict of the jury and to grant said defendant a new trial, and the court upon due consideration overruled the motion to set aside verdict and denied the motion for a new trial, to which rulings the defendant by his said attorneys excepted.

Thereupon the defendants interposed a motion in arrest of judgment, and the court having heard the argument for said motion overruled the motion in arrest of judgment.

[Page 359.]

137. UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JEFFERSON WILSON, DEFENDANT. } Convicted of murder.

The defendant being present in open court in person and by his counsel, O. T. Rouse and W. M. Lovell, and the United States district attorney, H. R. Jeffords, and assistant United States attorney, Calvert Wilson, present on the part of the United States, this being the time heretofore fixed for passing judgment on the defendant in this case, the defendant, Jefferson Wilson, was duly informed by the court of the nature of the indictment found against him for the crime of murder committed on
34 the 26th day of August, A. D. 1889, of his arraignment and plea of not guilty as charged in the indictment, of the trial and the verdict of the jury on the 29th day of May, A. D. 1890. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment, that whereas, you, Jefferson Wilson, having been duly convicted in this court of the crime of murder, it is therefore ordered, adjudged, and the judgment and sentence of the court is that you, Jefferson Wilson, be taken by the marshal of the said Territory of Arizona to the county jail of Maricopa County, or to some other convenient place in the second judicial district of this Territory, and within a time and in the manner to be fixed by law, and there suffer death by hanging by the neck until you are dead.

The defendant was then remanded into the custody of the marshal.

35 November term, 1890.

Hon. Jos. H. Kibbey, judge, presiding.

Be it remembered that on the 5th day of December, A. D., 1890, the same being a regular term day of the November term of said court, the following proceedings among others were had:

[Page 396.]

In the matter of a grand jury.

It is ordered that a grand jury of seventeen persons be summoned forthwith to attend at the November term, 1890, of the said court, at Phœnix, in said district, to inquire into all offenses as against the laws of the United States, said jurors to be summoned according to law and to be in attendance upon said court on December the 12th, 1890.

Be it further remembered that on the 11th day of December, 1890, the same being a regular term day of the November term of said court, the following proceedings among others were had:

On the venire heretofore drawn, the dep. U. S. marshal returns the fol-

lowing seventeen electors, duly summoned to appear at this court to serve as grand jurors, qualified as such:

[Page 400.]

1. Chas. Baker.
2. Isaac Levy.
3. John Dorrington.
4. T. W. Lanmeister.
5. Thos. Gates.
6. Hugh Chalmers.
7. George Morse.
8. Frank Shields.
9. A. J. Doran.
10. W. C. Smith.
11. M. Calderwood.
12. J. B. Kelley.
13. T. H. Seelig.
14. J. F. Dennis.
15. W. A. Davis.
16. Chas. Goldman.
17. C. H. Veil.

Be it further remembered that on the 12th day of December, 1890, the same being a regular term day of the November term of said court, the following proceedings among others were had:

The United States marshal called the names of the grand jurors heretofore summoned and all answered.

36 The asst. U. S. attorney examined them as to their qualifications, all being qualified.

The court then ordered the prisoners brought into open court. The U. S. dep. marshal brought the following prisoners before the court, among others:

Jefferson Wilson.

The court then stated to the grand jurors the nature of the charges against the prisoners.

The jury was then sworn as to their competency and examined by the U. S. attorney and * * * * * by the court on behalf of Primus Douglass, Jefferson Wilson, James Logan, David Edwards, and Alonzo Salazar.

A. J. Doran, Charles Goldman, and Frank Shields were excused by the court, they having served on a grand jury during this year.

The court then ordered a special venire of three jurors to be summoned to appear at 1:30 p. m., it appearing to the court necessary for such number to be summoned.

1:30 P. M.

On the special venire heretofore issued the dep. U. S. marshal returns as duly summoned the following qualified electors:

(1) Leo Goldman, (2) E. J. Bennitt, (3) Richard Markley.

The names of the above jurors were called and all answered and were sworn as to their qualifications. The prisoners were brought before the grand jury and defendants Wilson, Edwards, Logan, and Douglas challenged J. B. Kelley and C. H. Veil for the reason that said jurors had been on the last grand jury. The court then instructed said Kelley and Veil as to their duties in the matter of the charges against said defendants.

John Dorrington was selected by the court as foreman of the grand jury and sworn, and the grand jury was then sworn and instructed by the

37 court. F. W. Sheridan was sworn as bailiff and the jury retired.

And be it further remembered that on the 20th day of December, 1890, the same being a regular term day of the November term of said court, the following proceedings among others were had:

The grand jury coming into open court the following presentments were

made by their foreman, in which at least twelve [12] of their number had concurred. [Among others:]

[Page 445.]

| | |
|---|---|
| 154. UNITED STATES OF AMERICA *vs.* PRIMUS DOUGLAS, JEFFERSON WILSON, JAMES Logan, and David Edwards. | Murder. |

A true copy of which indictment is as follows:

In the district court of the second judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

| | |
|---|---|
| UNITED STATES OF AMERICA *vs.* PRIMAS DOUGLASS, JEFFERSON WILSON, James Logan, and David Edwards. | In the district court of the second judicial district of the Territory of Arizona, the 20th day of December, one thousand eight hundred and ninety. |

Primas Douglass, Jefferson Wilson, James Logan, and David Edwards are accused by the grand jury of the United States of America, chosen, selected, and sworn within and for the second judicial district of the Territory of Arizona, in the name and by the authority of the United
38 States of America, by this indictment, of the crime of murder, committed as follows:

The said Primas Douglass, Jefferson Wilson, James Logan, and David Edwards, late of the second judicial district aforesaid, heretofore, to wit, on the 26th day of August, A. D. one thousand eight hundred and eighty-nine, and within the said second judicial district of the Territory of Arizona, and within and upon the White Mountain Indian Reservation, in the second judicial district aforesaid, and within the county of Gila, in said Territory of Arizona, unlawfully, feloniously, wilfully, and of their malice aforethought, with force and arms, did make an assault in and upon one William Flemming; and they, the said Primas Douglass, Jefferson Wilson, James Logan, and David Edwards, then and there with a certain piece of iron, which he, the said Jefferson Wilson, in both of his hands, then and there had and held, and with a certain club, which he, the said Primas Douglass, in both his hands then and there had and held, against the said William Fleming, and in and upon the head of him, the said William Fleming, then and there unlawfully, wilfully, feloniously, and of their malice aforethought, did strike, giving unto him, the said William Fleming, then and there, with the said piece of iron and with the said club, by the strokes aforesaid, several mortal wounds, of which said several mortal wounds, given in manner aforesaid in and upon the head of him, the said William Fleming, he, the said William Fleming, on the 26th day of August, eighteen hundred and eighty-nine, in and upon the White Mountain Indian Reservation, in the county of Gila aforesaid, and within the second judicial district aforesaid, in the Territory of Arizona, died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Primas Douglass, Jefferson Wilson, James Logan, and David Edwards, in the manner and form aforesaid, and at the time and
39 place aforesaid, did then and there unlawfully, wilfully, feloniously, and of their malice aforethought, kill and murder him, the said William Fleming, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

HARRY R. JEFFORDS,
*United States Attorney for the Territory of Arizona.*

(Endorsed:) No. 154. In the district court, second judicial district, Territory of Arizona. United States of America vs. Primas Douglass, Jefferson Wilson, James Logan, and David Edwards. Indictment. A true bill. John W. Dorrington, foreman of the grand jury. Indictment No. ——.

Witnesses examined before the grand jury: William Varnum, Sam'l James, Edward Gwynn, Sam. Humphries, Madison Veile, Voll Hopkins, Wm. C. Jones.

Presented to the court in the presence of the grand jury by their foreman and filed this 20th day of December, 1890.

J. H. STOUT, *Clerk.*

And be it further remembered that on the 22nd day of December, 1890, the same being a regular term day of the November term of said court, the following proceedings, among others, were had:

[Page 477.]

154. UNITED STATES OF AMERICA
*vs.*
PRIMUS DOUGLAS, JEFFERSON WILSON, DAVID Edwards, and James Logan. } Arraignment.

The defendants herein being present in open court, and H. R. Jeffords, U. S. attorney, on behalf of the Government, the court duly arraigned said defendants by reading to them the indictment herein and delivering to each of them a certified copy of said indictment.

40 The court then asked each of said defendants if their true names appeared in said indictment, to which each for himself said that Primus Douglass, Jefferson Wilson, David Edwards, and James Logan was his true name, and the court then warned each if such was not his name to now make it known, or he would hereafter be prosecuted thereunder. The court granted one day to plead.

41 TERRITORY OF ARIZONA,
*Second Judicial District:*

I, J. H. Stout, clerk of the district court of the second judicial district of the Territory of Arizona, do hereby certify that the foregoing twenty-five pages of type-written matter is a true copy of the records of this court

so far as they appertain to the indictments and trial of Jefferson Wilson, charged with murder, as the same appears in minute book "3" of the records of said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this the sixth day of March, A. D. 1891.

[SEAL.] J. H. STOUT,
*Clerk District Court, Second Judicial District, Territory of Arizona.*
By FRANK C. KIBBEY,
*Deputy.*

42 (Indorsement on cover:) No. 11. Orig'l. Ex parte: In the matter of Jefferson Wilson, petitioner. Return to rule. Supreme Court U. S. 1890. October term. Filed Mar. 25, 1891.

Office Supreme Court U. S.
FILED,
FEB 2 1891
JAMES H. McKENNEY,
CLERK.

# IN THE SUPREME COURT OF THE UNITED STATES.

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IN THE MATTER OF THE APPLICATION OF JEFFERSON WILSON FOR A WRIT OF HABEAS CORPUS.

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Now comes J. Altheus Johnson for the petitioner and moves this Honorable Court for leave to file a petition praying that a writ of *habeas corpus* may issue from this court, and that the same may be prosecuted *in forma pauperis;* and he submits on this motion the accompanying brief.

And, it appearing that the petitioner is now under sentence of death, the speedy action of this Honorable Court in the premises is earnestly prayed.

Respectfully submitted,

J. ALTHEUS JOHNSON,

*For the Petitioner.*

# IN THE SUPREME COURT OF THE UNITED STATES.

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IN THE MATTER OF THE APPLICATION OF JEFFERSON WILSON FOR A WRIT OF HABEAS CORPUS.

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BRIEF ACCOMPANYING MOTION FOR LEAVE TO FILE, &c.

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The petitioner, Jefferson Wilson, a citizen of the United States, of African descent, was indicted on the 24th of May, 1890, jointly with one Primus Douglas, also a citizen of the United States, of African descent, in the District Court of the Second Judicial District of the Territory of Arizona, for the murder of one William Fleming, who was also a person of African descent. The said District Court was at the time sitting at Phœnix, in the county of Maricopa, in the said judicial district, and was exercising *the functions of a court of the United States*, and not the functions of a court of the Territory; and the grand jury of the said court consisted of a panel of but fifteen persons. The indictment so found by the said grand jury charged the offense to have been committed upon the White Mountain Indian Reservation, in the county of Gila, in the said Second Judicial District, on the 26th day of August, 1889; and upon this indictment the petitioner was put to trial before a petit jury of the said court, sitting

as aforesaid, on the 27th day of May, 1890; and the said petit jury returned a verdict against the petitioner of "Guilty of murder in the first degree;" and the said court, sitting as aforesaid, did, on the 12th day of June, 1890, sentence the petitioner, upon the said verdict, to be hanged by the United States marshal for the Territory of Arizona; and the said marshal now imprisons and restrains the petitioner of his liberty in the jail at Phœnix, in the county of Maricopa, aforesaid.

The petitioner believes the present restraint of his liberty to be illegal for two reasons:

First: That the court which indicted and tried him was without jurisdiction in the premises.

The view of the petitioner is that the proper court to try and to punish the offense of murder committed on an Indian reservation in Arizona is the District Court *sitting as a Territorial* and not as a United States Court, the indictment to run in the name of "The People of the Territory, &c.," and not in the name of the "United States of America;" that, for said court, as a court of the United States, to have had jurisdiction of the offense charged, the place where the murder was committed must, under Sec. 5339, R. S., have been under the "exclusive jurisdiction" of the United States (U. S. *v.* Bevans, 3 Wheat., 336, 386; U. S. *v.* Bateman, 34 Fed. Rep., 86; U. S. *v.* Ward, 1 Woolworth, 17; S. C., 12 Myer's Fed. Dec., 437; U. S. *v.* Stahl, 1 Woolworth, 192; S. C., 12 Myer's Fed. Dec., 435). But the Congress, by act approved March 3, 1885, 23 St., 385, conferred upon the Territory and her courts full jurisdiction of the offense of murder when committed on an Indian reservation by an Indian. (*Ex parte* Gon-shay-ee, 130 U. S., 343.) This offense had theretofore, when committed in such place by others than an Indian, been cognizable by the courts of the United States under Sec. 2145, R. S. The petitioner

believes that the United States, by yielding up a part of her jurisdiction over the offense of murder when committed on an Indian reservation, lost all; that is, that her jurisdiction of the offense in the particular place must be "sole and exclusive," or it will not exist at all; that it cannot be that there shall be one law and one mode of trial for a murder in a particular place if committed by an Indian, and another law and mode of trial for the identical offense in the same place committed by a white man or a negro.

Too, it may be worth while to remark that the lands constituting the White Mountain Indian Reservation were not in the possession of an Indian tribe, or reserved from Territorial jurisdiction, at the organization of the Territory, but that they passed as completely under the authority of the Territory as any other lands within the Territorial limits. They were subsequently, by Executive order, set apart and converted into an Indian reserve; and, the barrier excluding the Territory from the reservation and protecting the reserve from Territorial inroads having been broken down by the act of 1885, it would seem to be now proper to admit to the reservation the laws of the Territory, certainly as applicable to the offenses enumerated in the said act of 1885 (Utah & Northern Ry. Co. *v.* Fisher, 116 U. S., 28; U. S. *v.* McBratney 104 U. S., 621; Langford *v.* Monteith, 102 U. S., 145).

Second. That the grand jury which indicted him was not a legally constituted tribunal.

The session of the Fifteenth Legislative Assembly of Arizona, which commenced on the 21st day of January, 1889, did, on the 12th day of March following, pass an act requiring that grand juries should consist of not less than seventeen nor more than twenty-three persons. That act was duly placed in the hands of the Governor of the Territory on the said 12th day of March; and the Gov-

ernor did not, within ten days after his receipt thereof (Sundays excepted), return it with his veto to either House of the said Legislative Assembly; and the said Legislative Assembly remained in session until the 10th day of April, 1889. By act of Congress approved December 23, 1880, 21 St., 312, the duration of the sessions of the legislative assemblies of the Territories is limited to sixty days; and sixty consecutive days of the calendar, from January 21, 1889, would expire on the 21st day of March, 1889; but the said session of the Arizona Legislative Assembly, although it extended over more than sixty consecutive calendar days, embraced only forty-nine legislative days; or, in other words, forty-nine of the calendar days of the period covered by the said session embrace all the legislative sittings of the session.

To be specific:

| | | |
|---|---|---|
| Period covered by session, January 21 to April 10..... | | 80 days. |
| January 26 to February 7, adjournment in joint convention, (pp. 40, 258, printed journals of the session)..... | 11 days. | |
| March 23 to March 29, adjournment under concurrent resolution (pp. 216, 217, 440, 441, ditto)..... | 5 " | |
| March 30 to April 6, recess adjournment (pp. 218, 442, ditto)..... | 6 " | |
| February 9, neither house in session..... | 1 " | |
| February 10, 17, 24, March 3, 10, 17 and April 7, (Sundays) neither house in session..... | 7 " | |
| February 22d, neither house in session... | 1 " | |
| Total..... | 31 days | |
| Sessional days..... | 49 | |
| | | 80 days. |

The view of the petitioner is that the said act of the Legislative Assembly of Arizona became operative without the approval of the Governor; and that, if so, it became and was the law as to the impaneling of grand juries in the District Courts of Arizona in their capacities of both United States and Territorial courts (Reynolds *v.* U. S., 98 U. S., 145; Clinton *v.* Englebrecht, 13 Wall., 434); and that, therefore, the grand jury, consisting of but fifteen persons, which was impaneled subsequently to the operation of that law, and which indicted him in May, 1890, was not a legal or competent tribunal for the purpose; and that the paper, purporting to be an indictment, which was found by that body, was utterly void of legal effect; and that no jurisdiction whatever was thereby conferred upon the court to hold him "to answer for a capital or otherwise infamous crime." (Art. V of Amendts. to Const.) (Norris' House *v.* The State, 3 Greene (Iowa), 513; State *v.* Hawkins, 10 Ark., 71; Doyle *v.* The State, 17 Ohio (Griswold), 222; Lott *v.* The State, 18 Texas App., 627; The State *v.* Thurston, 5 Cal., 69; *Ex parte* Bain, 121 U. S., 1.)

This question involves the construction of Sec. 1852 of the Revised Statutes of the United States, as amended by act of Congress approved December 23, 1880, 21 St., 312, above mentioned. As amended, the section reads:

"The sessions of the legislative assemblies of the several Territories of the United States shall be limited to sixty days' duration."

This section of the Revised Statutes is taken from an act of January 23, 1873, 17 St. at L., 416; and a reference to the original act, which it is permissible to make to ascertain the meaning and purpose of the law (U. S. *v.* Bowen, 100 U. S., 508; Myer *v.* Car Co., 102 U.S., 1-12), will show that what was in the mind of the Congress, and that what

the Congress intended to accomplish, was the regulation of the expenses of the legislative assemblies of the Territories, which are paid from the Treasury of the United States; and the history and circumstances of the act will show that the object was the curtailment and limitation of such expenses; and the legislation is undoubtedly effective for that purpose. No member or officer of a Territorial Legislative Assembly is entitled to pay for exceeding sixty days for any one session of the Assembly; and it is conceded by counsel for the petitioner that it is usual and proper to pay for Sundays, and possibly such other days as may intervene on which no legislative sitting is had; so that, if adjournment *sine die* is had sixty calendar days from the original assembling, the members and officers are paid for sixty days; and it is also conceded that, when payment to that amount shall have been made, no further compensation can arise or accrue to the members or officers by virtue of any one session of the Assembly. But, if the Assembly does not then adjourn, the question of the validity and effect of acts passed by the Assembly after the expiration of such time is a question wholly different from that of the personal compensation of the members, and to be determined by wholly different rules.

In the consideration of this question we may inquire, first,—whether the statute above named, Sec. 1852, Revised Statutes, is mandatory in its terms, or *directory* only; and, secondly,—whether the day contemplated is the *calendar* or the *legislative* day; and by legislative day is here meant a day of the calendar some part of which is actually taken or consumed in a legislative sitting.

It is familiar elementary law that statutes frequently contain provisions which ought to be followed, but which, especially when they are addressed to the mode or time of doing a thing, do not limit the power in respect of which they are prescribed; and that the power may be ef-

fectually exercised without observing such restraints. It is a very general rule which in such matters makes the character of the statute to turn upon the fact as to whether or not negative words are employed, thus plainly importing that the act shall be done in a particular manner or time, and not otherwise.

Cooley on Const. Lim., 5th ed., pp. 88-89, 92-93.
Bishop on Written Laws, sec. 255.
Sedgwick on St. and Const. Law, 2d ed., p. 316.
Maxwell on Interp. of St., p. 337.

As Mr. Justice Field, of this court (in French *v.* Edwards, 13 Wall., 511), expresses it:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated."

The statute under consideration, prescribing the duration of the sessions of the Territorial Legislative Assemblies, does not state that the sessions shall not be more than sixty days in duration, and that any legislation attempted by the Assemblies after the expiration of that time shall be null and void, as in the constitution of Louisiana of 1868, which provides, in Title II, Sec. 39, that "no session shall extend beyond the period of sixty days, to date from its commencement; and any legislative action had after the expiration of said period of sixty days shall be null and void."

Besides, the principle upon which the Territories are constituted is to allow to the people of the Territory the greatest freedom and liberty of action consistent with the authority of the General Government and the inhibitions imposed by Congress. As Chief Justice Chase said, in Clinton *v.* Englebrecht, 13 Wall., 441: "The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress." Again, p. 443: "In all the Territories full power was given to the Legislature over all ordinary subjects of legislation. The terms in which it was granted were various; but the import was the same in all." Sec. 1846, Revised Statutes, United States, provides: "The legislative power in each Territory shall be vested in the Governor and Legislative Assembly. The Legislative Assembly shall consist of a Council and House of Representatives. The members of both branches of the Legislative Assembly shall have the qualifications of voters as herein prescribed. They shall be chosen for the term of two years, and the sessions of the respective Legislative Assemblies shall be biennial," &c., &c. Sec. 1851 provides: "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," &c., &c.; and, as illustrative of the legislative power of the Territories in their organized capacities, it may be remarked in passing that an act of Congress providing for the United States that capital punishment shall be by *hanging*, does not prevent a Territory from providing that it shall be by *shooting* or by *beheading* (Wilkerson *v.* U. S., 99 U. S., 130); and, further, that an act of Congress providing that the interest of a person in the matter in

controversy shall not disqualify him from being a witness, does not obtain in a Territory, where a different rule may prevail. (Good *v.* Martin, 95 U. S., 90, 98.)

With this plenary grant of legislative power to the Territorial Legislative Assemblies, there would seem to be little occasion, looking to the whole scope of the legislation on the subject, for holding otherwise than that the statute under consideration, so far as the validity of acts of the Legislative Assemblies are concerned, is *directory* merely, and not *mandatory*.

But there is another view of the matter, and that is as to the character of the day meant, whether *calendar* or *legislative*.

The word *day* is construed differently, according to the reason of the thing and the circumstances of the case. For instance, while it is generally used in law to mean the space of time which elapses between two successive midnights (civil or natural day), (2 Bl. Com., 141), it may mean also the hours during which business is ordinarily transacted (business day) (Hinton *v.* Locke, 5 Hill (N. Y.), 437); and it may also mean the time during which the sun is above the horizon (day as distinguished from night) (Coke, 3d Inst., 63). It may also be understood to mean *working days* only. (Cochran *v.* Retberg, 3 Esp., 121.) Indeed, for some purposes, a day of the calendar will be ignored altogether; as, for instance, Sundays, which in the conduct of the courts are reckoned *dies non juridici*. Thus in Missouri, where a statute provides that "all motions for new trials and in arrest of judgment shall be made *within four days* after the trial, if the term so long continue, and, if not, then before the end of the term," the Supreme Court (Nat'l Bank of Metropolis *v.* Williams, 46 Mo., 17), held that, under the well-settled rules of the common law, "as to matters *to be transacted in court*, Sunday is *non dies*, and should not be counted," citing Halles *v.*

Owen, 2 Salk., 625; Rex *v.* Elkins, 4 Burr., 2130; Thayer *v.* Felt, 4 Pick., 354; 2 Hill (N. Y.), 375.

In Michie *v.* Michie, 17 Grattan, 109, it was held that Sunday, being *dies non juridicus*, was not one of the days of a term of court; and where a Virginian statute read as follows: "Every such term of said courts (the county courts) may continue not exceeding fifteen days, and may adjourn from day to day, or to any day within the fifteen days," the Supreme Court (in Read *v.* The Commonwealth, 22 Grattan, 924, 952), stated that a judgment pronounced on the 16th calendar day from the commencement of the term was good, the term not having ended, Sundays being excluded.

Likewise in Massachusetts, under a statute which provides that "no person shall serve as a traverse juror in the county of Suffolk more than thirty days at any one term of court, unless for the purpose of finishing a case commenced within that time," a challenge to the array was made "because more than thirty days have elapsed since said jury was first impaneled to try causes at this term, and more than thirty consecutive days have elapsed since each and every juryman upon said panel entered upon the first day of his service at this term." The court, however, in which the challenge was made, had been in actual session for only twenty-eight days; and the challenge was overruled. The Supreme Judicial Court (Provident Institution for Savings *v.* Burnham, 128 Mass., 458), through Chief Justice Gray, say, in affirming the action of the lower court: "The 'thirty days' here intended are manifestly days on which the court is in session, and on which jurors may be called upon to serve."

The Supreme Court of Illinois (in Chicago *v.* The Vulcan Iron Works, 93 Ill., 222), held that the six days of the publication of the notice of the filing of the assessment-roll in the city clerk's office, required by the provisions of

the charter of Chicago in the condemnation of land for a street, must be exclusive of Sundays, Sunday being *dies non juridicus*.

The rule seems to be uniform that, where the word *days* in statutes refers to matters *to be transacted in court*, it does not include Sundays and other *dies non juridici;* and there would seem to be no good reason why the same construction should not apply when the word is used with reference to matters *to be transacted in legislative assemblies*, *dies non leges ferentes*.

But, furthermore, this question has received an express adjudication in Alabama. The Constitution of that State of 1875, Art. IV., Sec. 5, provides that the General Assembly "shall meet biennially * * * * and shall not remain in session longer than sixty days at the first session held under this constitution, nor longer than fifty days at any subsequent session;" and in Art. V., Sec. 13, it provides that "if any bill shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it; unless the General Assembly by their adjournment prevent its return, in which case it shall not be a law."

The Supreme Court of the State, in Moog *v.* Randolph, 77 Ala., 597, 608, said, speaking by Mr. Justice Somerville: "I am satisfied that fifty days means *fifty legislative working days* exclusive of the Sundays and other days upon which the Senate and House concur in refusing to sit by joint resolutions of adjournment. This question has been repeatedly considered by the Judiciary Committee of the Senate and House of Representatives and successive sessions of the General Assembly since the adoption of the constitution; and their reports concurring in this view have in each instance been adopted by these bodies. Even if we regard the question as a doubtful

one, we would hesitate to depart from this settled legislative construction of the fundamental law, especially in view of the serious consequences which would necessarily follow from it. The right to adjourn *ad libitum* upon certain week days and the right to draw pay for such days are questions not necessarily dependent the one on the other. The power to adjourn may exist without the right to draw pay; and they are not convertible or correlative powers, as has been argued before us at the bar. This suggestion is not intended to cast any doubt upon the previous decisions of this court, holding that members may draw their per diem pay on Sundays, a view in which we all concur."

If it should be thought that a legislative construction by the Arizona Assembly is necessary to make the present case meet the requirements of the Alabama decision, we have such construction. The Journals of the Eleventh Legislative Assembly (p. 991) show that a member of the Council, on March 11, 1881, offered a resolution of the following tenor:

"Whereas, according to the provisions of Sec. 1852 of the Revised Statutes of the United States, the sessions of the Legislative Assemblies of the several Territories of the United States shall be limited to forty days duration;

"And whereas such time was extended to sixty days by an act of Congress approved December 23, 1880;

"And whereas the sixty days of this session expired on the 4th day of March, 1881;

"And whereas this Legislative Assembly has no legal right to remain in session after the said 4th of March;

"Therefore, be it resolved by the council, the house concurring, that the Eleventh Legislative Assembly of Arizona adjourn *sine die* at 12 o'clock this P. M."

The Journal shows the resolution to have been tabled by a vote of 8 to 4. That Assembly was in session for a period of sixty-nine consecutive days, January 3, 1881, to

March 12, 1881, having sat sixty days exclusive of Sundays. Likewise, the session of the First Legislative Assembly, when the limit was forty days, sat for a period of forty-six consecutive days, September 26, 1864, to November 10, 1864, the same embracing forty days exclusive of Sundays.

Some of the most important acts which the Legislative Assemblies of Arizona have ever undertaken to do were done in the closing scenes of the sessions which extended beyond the calendar limit. It was within the last six days of the session of the First Legislative Assembly that the "Howell Code," so-called, was adopted, which provided the general laws of the Territory, and which was in force until the revision of 1887. It was within the last nine days of the session of the Eleventh Legislative Assembly (pp. 841, 869 and 919 of the Journals) that the time of the meetings for future Assemblies was changed from the *first Monday* in January, the date originally fixed by law, to the *second Monday;* and the Twelfth, Thirteenth and Fourteenth Assemblies, in accordance therewith, met on the *second Mondays* in January. If the Eleventh Assembly at the time it acted was without power to pass the law changing the date of meeting, so that the old law remained unchanged, then the Twelfth, Thirteenth and Fourteenth Assemblies each sat beyond the sixty-day limit; and not that only, but the Fourteenth Assembly, on the last day of its session, the sixtieth of the calendar period, passed a law changing the date of meeting from the *second* to the *third* Monday in January (pp. 567, 568, 193, 194 and 199 of the Journals); and, in accordance with this last-named act, the Fifteenth Assembly met on the 21st of January, 1889, as before stated, thus making a still larger part of the session of this Assembly held in unauthorized time if it be incompetent for an Assembly to do aught that is

valid after the expiration of a certain limit imposed by the calendar.

This sketch is sufficient to indicate not merely the construction which the Legislature of Arizona has put upon the provisions of Sec. 1852 of the Revised Statutes of the United States; it will indicate also the very great interest which the question under consideration has for the people of the Territory. If their Legislative Assemblies, after the expiration of a certain period of the calendar, without regard to their actual sittings, have been unable to make laws, then a very large part, and the most important part, of what has gone into their statute-books is not law. The fact that it was submitted to Congress under Sec. 1850 of the Revised Statutes, and that Congress did not "disapprove," does not meet the exigency of the situation; for there was no occasion for Congress to disapprove of that which was already without validity.

It will thus be seen that the question is one which addresses itself to the very vitals of the laws of Arizona, offering to disturb even the foundations upon which they rest. The question is so far-reaching in its consequences and fraught with so much of gravity to the people of the Territory that the utmost anxiety exists on the subject. Indeed, the decision (by a divided court) of the Supreme Court of the Territory (in Cheyneum *v.* Smith, Pac. Rep. ), made since the trial and conviction of the petitioner, sustaining the validity of a law passed after the expiration of the calendar period of sixty days, has not been able fully to quiet apprehension; and nothing short of a judicial expression from this court can effectually relieve the situation of its anxiety and settle the matter definitively.

The petitioner in this matter prays that this court may exercise the original jurisdiction of which it is possessed

in such matters (*Ex parte* Medley, 134 U. S., 160; *Ex parte* Mirzan, 119 U. S., 584), and issue the writ of *habeas corpus* in his behalf and relieve him of his present confinement, which he believes to be illegal.

The petitioner, in the court which tried and convicted him, as recited above, duly objected to the jurisdiction of the said court to try the offense charged; and to the sufficiency of the grand jury which found the indictment.

J. ALTHEUS JOHNSON,
*For the Petitioner.*

# IN THE SUPREME COURT OF THE UNITED STATES.

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IN THE MATTER OF THE APPLICATION OF JEFFERSON WILSON FOR A WRIT OF HABEAS CORPUS.

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*To the Honorable the Supreme Court of the United States:*

Your petitioner, Jefferson Wilson, respectfully shows to your Honors that he is a citizen of the United States, of African descent; that he is now imprisoned and restrained of his liberty in the county jail, in the city of Phœnix, the county of Maricopa, Territory of Arizona, by one R. H. Paul, United States Marshal for the Territory of Arizona; that the cause of his said confinement, imprisonment and restraint of his liberty is as follows, to wit:

That heretofore, and on the 24th day of May, 1890, your petitioner was indicted by a purported grand jury consisting of only fifteen persons, impaneled and sworn as a grand jury to inquire into all offenses against the laws of the United States, in the Second Judicial District of the Territory of Arizona. Said grand jury was and had been theretofore impaneled and sworn in the District Court of the Second Judicial District of the Territory of Arizona, a court then and there sitting in the city of Phœnix, county of Maricopa, Territory of Arizona, and then and there having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States;

That said Second Judicial District is and was then composed of the counties of Maricopa, Yuma, Pinal and Gila of said Territory;

That your petitioner was accused by said indictment, jointly with one Primus Douglas, of the crime of murder, in the alleged killing of one William Fleming, a negro man, on or about the 26th day of August, 1889, upon the White Mountain Indian Reservation in the county of Gila, and within said Second Judicial District, a copy of which said indictment is hereto attached, marked Exhibit "A," and made a part of this petition. That thereafter, and on the 27th day of May, 1890, when this defendant and the said Primus Douglas were called to plead to said indictment, they filed in said court the following objections to said indictment:

First: That the grand jury which found said indictment had no legal authority to inquire into the offense charged in said indictment;

Second: That the above-entitled court has no jurisdiction as appears upon the face of said indictment of the offense charged or to try said cause;

Third: That the facts set forth in said indictment do not constitute a public offense against the United States or the laws thereof;

Fourth: That the matters contained in said indictment constitute a legal bar to the prosecution of the alleged offense in the above-entitled court.

That each and all of said objections were overruled by the court, and that your petitioner then entered his plea of not guilty to said indictment. And that thereafter, and on the 27th day of May, 1890, your petitioner was put upon trial before a jury on said indictment in said court.

That thereafter, and on the 29th day of May, 1890, said jury returned a verdict against your petitioner in said cause of "Guilty of murder in the first degree."

That said grand jury and said trial jury were summoned by the said United States Marshal from the body of said judicial district at large, and not by the Sheriff of Gila County from the body of said county.

That your petitioner was tried upon said indictment in said court, sitting as a United States Court, and not as a Territorial District Court, and was prosecuted by the United States Attorney for the Territory of Arizona, and not by the prosecuting officer of said Gila County.

That thereafter, and on the 12th day of June, 1890, said District Court, sitting as aforesaid, sentenced and adjudged your petitioner upon said verdict of guilty to be hanged for said alleged offense by the said Marshal of the United States. And the said R. H. Paul, United States Marshal for said Territory, now imprisons and restrains your petitioner of his liberty in the jail aforesaid under and by virtue of said judgment and sentence of said court for the purpose of executing your petitioner under and by virtue of said sentence of death, a copy of which said sentence and judgment is hereto annexed marked Exhibit "B," and made a part hereof.

That your petitioner has been informed by his counsel, O. T. Rouse and W. M. Lovell, and he believes and therefore alleges, that his said imprisonment and the said restraint of his liberty is illegal; that the illegality of his said imprisonment consists in this;—that said alleged crime is charged in said indictment to have been committed on the White Mountain Indian Reservation in the county of Gila, Arizona Territory, and not in the county of Maricopa, where your petitioner was indicted, tried, convicted and sentenced; that the grand jury which found said indictment, and the trial jury which tried said cause, were summoned by R. H. Paul, United States Marshal, from the body of the Second Judicial District, and not by the Sheriff of Gila County; that the said alleged crime is

charged as having been committed on the White Mountain Indian Reservation in the County of Gila; that the alleged crime was not an offense against the laws of the United States; that the United States courts have not exclusive jurisdiction over the place where the alleged crime is charged to have been committed, and that said court, sitting as a United States court, had no jurisdiction to try your petitioner on said indictment; that the grand jury which found said indictment was composed of only fifteen persons, and not of seventeen nor more than twenty-three persons, as required by law; that said grand jury of fifteen persons was impaneled by said District Court (sitting as and exercising the jurisdiction of a United States court) under the provisions of the Revised Statutes of Arizona of 1887, which provide that a grand jury shall consist of not less than thirteen nor more than fifteen persons.

That the Fifteenth Legislative Assembly of said Territory convened according to law on the 21st day of January, 1889; that thereafter and while duly in session and on the 12th day of March, 1889, and within sixty days from the commencement of said session, said Legislative Assembly passed a law repealing the grand jury law of 1887 and enacting instead thereof a law providing that a grand jury shall consist of not less than seventeen nor more than twenty-three persons; that said law so passed by said Legislative Assembly was duly delivered to the Governor of said Territory for his approval, as required by law, on the 12th day of March, 1889, and within sixty days from the commencement of the said session of said Legislative Assembly; that said act was not approved by said Governor; that sixty consecutive days of the calendar from the commencement of the said session of said Legislative Assembly expired on the 21st day of March, 1889; that said Legislative Assembly continued in session after the

expiration of sixty such days up to the 10th day of April, 1889; that only forty-nine of the calendar days embraced in the period covered by the said legislative session were in any part used or consumed as legislative days; that said act remained in the hands of said Governor unapproved by him from said 12th day of March, 1889, when the same was delivered to him, for a period of more than ten days (Sundays excepted), and while said Legislative Assembly continued in session; and that said act thereby became a law without the approval of the Governor; and that said grand jury, not having been impaneled in accordance therewith, was illegally constituted in this;—that it consisted of only fifteen persons instead of not less than seventeen nor more than twenty-three persons, as required by said act of said Legislative Assembly; and that it had no power or authority in law to find or present said indictment against your petitioner.

Wherefore, your petitioner prays that a writ of *habeas corpus* be issued in his behalf and directed to him, the said R. H. Paul, United Sates Marshal for Arizona, directing him, the said marshal, to have the body of your petitioner before your Honorable Court at a time and place therein to be specified, to do and to receive what then and there shall be considered by your Honors concerning him, together with the plan and cause of his detention, and said writ, and that your petitioner be restored to his liberty.

Dated this 23d day of December, 1890.

JEFFERSON WILSON.

Witness to signature:

FRANK C. KIBBEY.

J. ALTHEUS JOHNSON,
*His Attorney in U. S. Supreme Court.*

O. T. ROUSE AND W. M. LOVELL,
*His Attorneys in Court below.*

TERRITORY OF ARIZONA,
*County of Maricopa,* } ss:

Jefferson Wilson, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has heard the foregoing petition read, and knows the contents thereof; and that the statements therein made he believes to be true.

JEFFERSON WILSON.

Witness to signature:
FRANK C. KIBBEY.

Subscribed and sworn to before me this 23d day of December, 1890.

[SEAL.]

J. H. STOUT,
*Clerk District Court, 2d Judicial District, Territory of Arizona.*

(ENDORSEMENT.)

I admit the facts stated in the within petition but deny the conclusions of law.

H. R. JEFFORDS,
*U. S. Attorney for Arizona.*

EXHIBIT "A."

## IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT,

OF THE TERRITORY OF ARIZONA.

Having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States.

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|---|---|
| UNITED STATES OF AMERICA<br><br>*vs.*<br><br>PRIMUS DOUGLAS AND JEFFERSON WILSON. | *In the District Court of the Second Judicial District of the Territory of Arizona, the 24th day of May, one thousand eight hundred and ninety.* |

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Primus Douglas and Jefferson Wilson, accused by the grand jury of the United States of America, chosen, selected and sworn within and for the Second Judicial District of the Territory of Arizona, in the name and by the authority of the United States of America, by this indictment, of the crime of murder committed as follows: The said Primus Douglas and Jefferson Wilson, late of the Second Judicial District aforesaid, heretofore, to wit: On the 26th day of August, A. D. one thousand eight hundred and eighty-nine, and within the said Second Judicial District of the Territory of Arizona, and within and upon the White Mountain Indian Reservation in the Second Judicial District aforesaid, and within the County of Gila in said Territory of Arizona, unlawfully, wilfully, feloniously, and of their malice aforethought, with force

and arms, did make an assault in and upon one William Fleming, and they, the said Primus Douglas and Jefferson Wilson, then and there, with a certain piece of iron which he, the said Jefferson Wilson, in both his hands, then and there had and held, and with a certain club which he, the said Primus Douglas, in both his hands, then and there had and held, the said William Fleming, in and upon the head of him, the said William Fleming, then and there, unlawfully, feloniously, wilfully, and of their malice aforethought, did strike, giving unto him, the said William Fleming, then and there, with the said piece of iron and with the said club by the strokes aforesaid, in manner aforesaid, in and upon the head of him, the said William Fleming, several mortal wounds, of which said several mortal wounds he, the said William Fleming, on the 26th day of August, eighteen hundred and eighty-nine, in and upon the said White Mountain Indian Reservation in the County of Gila aforesaid, and in the Second Judicial District aforesaid of the Territory of Arizona aforesaid, died.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Primus Douglas and said Jefferson Wilson, in the manner and form aforesaid, and at the time and place aforesaid, did, then and there, unlawfully, feloniously, willfully, and of their malice aforethought, kill and murder him, the said William Fleming, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HARRY R. JEFFORDS,
*United States Attorney for the Territory of Arizona.*

[Endorsed]: No. 137. In the District Court, —— Judicial District, Territory of Arizona. United States of America

*vs.* Primus Douglas and Jefferson Wilson. Indictment. A true bill; Harry B. St. Clair, foreman of the grand jury. Indictment No.——. Witnesses examined before the grand jury, Letcher Hardenian, Wm. Worman, Wm. Adams, Wm. H. Abenderth, Edwin Given, Charles Fields, Sam'l James, H. C. Jones, Wm. C. Jones, Harry Jeffords, Samuel Humphries, Dand Lillie, Val. Hopkins, Madison Veil, Mrs. Lizzie Veil, Levy Bradley, Tom Davenport, George Parker, Frank Try, Lt. J. W. Watson, Rowdy, an Indian.

Presented to the court in the presence of the grand jury by their foreman and filed this 24th day of May, 1890. J. H. Stout, clerk.

TERRITORY OF ARIZONA, }
*County of Maricopa*, } *ss:*

I, J. H. Stout, clerk of the District Court, Second Judicial District, Territory of Arizona, hereby certify that the annexed copy of an indictment is a true, full and complete copy of the indictment against Primus Douglas and Jefferson Wilson, returned and filed in this office on the 24th day of May, A. D. 1890.

In witness whereof, I have hereunto set my hand and the seal of said court this the 23d day of December, 1890.

[SEAL.] J. H. STOUT, *Clerk.*

By FRANK C. KIBBEY, *Deputy.*

EXHIBIT "B."

UNITED STATES OF AMERICA,

DISTRICT COURT, SECOND JUDICIAL DISTRICT OF ARIZONA,

Having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States.

*May Term, A. D.* 1890.—*Thursday, June* 12, 1890.

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UNITED STATES OF AMERICA, *Plaintiff*,
*against*
JEFFERSON WILSON, *Defendant*. } No. 137.

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CONVICTED OF MURDER.

Be it remembered that on the 12th day of June, A. D. 1890, the same being a term day of said court, Hon. Joseph H. Kibbey, judge, presiding, the following proceedings, among others, were had in the above-entitled cause:

The defendant being present in open court in person and by his counsel, O. T. Rouse and W. M. Lovell, and the United States Attorney, H. R. Jeffords, and Assistant United States Attorney, Calvert Wilson, present on the part of the United States, this being the time heretofore fixed for passing judgment on the defendant in this case, the defendant, Jefferson Wilson, was duly informed by the court of the nature of the indictment found against

him for the crime of murder committed on the 26th day of August, A. D. 1889, of his arraignment and plea of not guilty as charged in the indictment, of the trial and the verdict of the jury on the 29th day of May, A. D. 1890; the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and, no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment, that whereas you, Jefferson Wilson, having been duly convicted in this court of the crime of murder, it is therefore ordered, adjudged, and the judgment and sentence of the court is, that you, Jefferson Wilson, be taken by the marshal of the said Territory of Arizona to the county jail of Maricopa County, or to some other convenient place in the Second Judicial District of this Territory, and within a time in the manner to be fixed by law, and there suffer death by hanging by the neck until you are dead.

The defendant was then remanded into the custody of the marshal.

JOSEPH H. KIBBEY,
*Judge.*

TERRITORY OF ARIZONA,
*County of Maricopa,* } ss:

I, J. H. Stout, clerk of the said court, do hereby certify the foregoing to be a true and correct copy of the judgment duly made and entered on the minutes of said court in the above-entitled action, and the whole thereof.

Attest my hand and seal of said court this 23d day of December, A. D. 1890.

[SEAL.]

J. H. STOUT,
*Clerk.*

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1890; NO. 11, ORIGINAL.

*Ex parte; in re* JEFFERSON WILSON, *Petitioner.*

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Supplemental brief in behalf of petitioner, showing the act "in relation to juries and jurors," and the origin of the act, as pertinent to one of the points relied upon by the petitioner.

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House bill, No. 40, of the Fifteenth Legislative Assembly of the Territory of Arizona, "To amend chapter 3, title 39, of the Revised Statutes (of Arizona) in relation to juries and jurors," was introduced in the House February 20, 1889, (p. 289 of the printed journals of the Legislative Assembly); and, after amendments (pp. 319, 341, ditto), was passed by the House March 8, 1889, (p. 348, ditto). It was passed by the Council March 9, 1889, (p. 125, ditto). The bill as thus passed was properly certified on March 12, 1889, (pp. 137, 364, ditto) and placed in the hands of the Governor for his action in the premises. (For further mention of said bill in the journals, see pp. 290, 322, 345, 121, 123).

The bill as thus passed by the two houses read as follows:

"AN ACT.

"To Amend Chapters One and Three, Title 39, of the Revised Statutes of Arizona, in relation to Juries and Jurors.

"*Be it Enacted by the Legislative Assembly of the Territory of Arizona:*

"SECTION 1. That Paragraph 2164 of Section 2, Chapter 1, Title 39, of the Revised Statutes of Arizona be and the same is hereby amended as follows:

"Paragraph 2164, Section 2. A Grand Jury shall be composed of not less than seventeen nor more than twenty-three men.

(Anterior to this amendment the paragraph read as follows: "*Paragraph 2164, Section 2. A Grand Jury shall be composed of not less than thirteen nor more than fifteen men.*")

"SEC. 2. Paragraph 2184, Section 22, of said Chapter and Title is hereby amended so as to read as follows:

"Paragraph 2184, Section 22. Not less than ten nor more than twenty days before the time of which either a Grand or Trial Jury shall be required to be in attendance upon the District Court, the Judge thereof may in his discretion make file with the Clerk of the District Court an order that the jury be drawn. The number to be drawn shall be fixed in the order; if to form a Grand Jury, it must not be greater than twenty-three nor less than seventeen, and if to form a Trial Jury, such number as the Judge may direct, not exceeding fifty; and such order shall also state the time at which jurors, grand or trial, shall be in attendance.

"SEC. 3. Subdivision 2 of Paragraph 2189, Section 27, of said Chapter and Title is hereby amended so as to read as follows:

"Subdivision 2. He must publicly draw out of the box such a number of such slips of paper as shall equal the number fixed in the order as provided in Section 22 of this Chapter.

"SEC. 4. That Paragraph 2204, Section 42, Chapter 3, Title 39, of the Revised Statutes of Arizona be and the same is hereby amended to read as follows:

"Paragraph 2204, Section 42. When, of the jurors summoned, not more than seventeen attend, they shall constitute a Grand Jury, but the fines hereinbefore prescribed shall nevertheless be imposed upon those who were duly summoned and failed to attend, unless good cause be shown for their non-attendance.

"SEC. 5. No Grand Juror shall be permitted or required to serve as such juror, after being once summoned and serving as such, until the whole number of Grand Jurors upon the Grand Jury list shall have served as such Jurors or shall have been excused from

such service, or shall have incurred such disability as to prevent such service, and each drawing shall proceed until the required number of qualified jurors is drawn.

"SEC. 6. This Act shall take effect and be in force thirty days from and after its passage."

The session of the said Legislative Assembly began on the 21st day of January, 1889; and the Assembly assumed to remain in session until the 10th day of April, 1889, on which day the adjournment *sine die* was voted. The Assembly held legislative sittings on but forty-nine of the calendar days embraced in the period named, January 21, to April 10, 1889, (the printed journal); and it was in actual session in both its branches on the 21st, the 22d, and the 23d days of March, 1889, (pp. 193–217, 420–441, ditto). But the Governor did not within ten days (Sundays excepted) either approve the bill above named by signing it, or return the same without his signature to the House in which it originated (Act of Congress approved July 19, 1876. 19 St., 91).

The allegations of the petition, so far as they refer to the foregoing facts, are expressly admitted by the District Attorney, and are not traversed by the return.

The order for the Grand Jury, May Term, 1890, which found the indictment, No. 137, on which the petitioner was tried, convicted and sentenced and the proceedings subsequent to said order, so far as relevant to the matter in hand, are shown in that part of the return which is embraced in pages 12 to 18 of the printed record.

The return (pp. 18-21 of printed record) shows also, what is not material to the present application, that in December last (1890) a new Grand Jury, consisting of seventeen persons, found an indictment, No. 154, for the same offense as that charged in the foregoing, which indictment is now pending in court, as also a former one, No. 130, charging the same offense, found in January, 1890, by a Grand Jury consisting of fifteen persons (pp. 7-12 of printed record).

The case of Cheyney *v.* Smith, cited on page 15 of petitioner's brief, which accompanied the motion for leave to file, is reported in 23 Pac. Rep., p. 680.

To the point that whether or not a supposed act of the legislature is law is a judicial question purely, to be determined by the Court, see

Sherman *v.* Story, 30 Cal., 253.

Weeks *v.* Smith, 81 Maine, 538, 545.

Gardner *v.* Collector, 6 Wall., 499, 511.

Town of South Ottawa *v.* Perkins, 94 U. S., 260, 267.

J. ALTHEUS JOHNSON,
*For Petitioner.*

Office Supreme Court U. S.
FILED.
MAY 1 1891
JAMES. H. McKENNEY,
CLERK.

# In the Supreme Court of the United States.

OCTOBER TERM, 1890.

EX PARTE: IN THE MATTER OF JEFFERSON WILSON, PETITIONER. No. 11, ORIGINAL.

**BRIEF ON BEHALF OF THE UNITED STATES.**

# In the Supreme Court of the United States.

OCTOBER TERM, 1890.

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EX PARTE: IN THE MATTER OF JEFFERSON WILSON, PETITIONER. NO. 11, ORIGINAL.

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## BRIEF ON BEHALF OF THE UNITED STATES.

This is a habeas corpus proceeding to collaterally test the question of the validity of the sentence of death pronounced upon the prisoner, Jefferson Wilson. The indictment was found, the trial was had, and sentence was pronounced by a district court in the Territory of Arizona sitting as a United States court. The crime of which the petitioner was convicted was murder. The crime was committed, as shown by the allegations of the indictment, on the White Mountain Indian Reservation, in the Territory of Arizona.

The record contained in the return of the marshal, who is made the respondent to the rule issued on the petition, shows that the grand jury which found the indictment was composed of fifteen members. It is claimed by the petitioner that the sentence is void for two reasons: first,

that the district court of Arizona, sitting as a United States court, had no jurisdiction to try anyone for the crime of murder committed in the Territory, either within or without the limits of the Indian reservation; second, that even if the court had jurisdiction to try such a crime, the law in force at the time of the trial required that the grand jury should consist of not less than seventeen nor more than twenty-three members, and that as the indictment herein was found by only fifteen members it was not an indictment and the court had therefore no jurisdiction to proceed to try the same. The petition alleges that the petitioner is a citizen of the United States of African descent. The objections to the validity of the sentence will be considered in their order.

I.

The White Mountain reservation, in Arizona, was created by the order of the President in 1871, as will be seen by the letters and orders contained in the appendix to this brief, and taken from a document issued by the Indian Department containing executive orders relating to Indian reservations, issued prior to April 1, 1890. The validity of these executive orders has been recognized by Congress in the act approved February 8, 1887 (24 Stats., 388), to provide for the allotment of lands in severalty to the Indians on the various reservations. The first clause of that act is—

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or

> executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon, in quantities, as follows.

The necessary effect of this act was to confirm to the Indians a title to the land in the reservation within the limitations of the act, even if any doubt existed before the passage of that act as to the legality of the executive order.

This court in the case of *Bates* vs. *Clark* (95 U. S. R., 204) decided that in the absence of any different provision by treaty or by act of Congress all that part of the United States to which the Indian title has not been extinguished is to be taken and deemed Indian country.

By section 2145 it is provided that except as to crimes the punishment of which is expressly provided for in the title "Indians" the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

By section 2146 section 2145 is limited so as not to extend to crimes committed by one Indian against the person or property of another Indian.

By section 5339 every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, shall suffer death.

By the twentieth clause of section 629 the circuit courts of the United States are given exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein.

By section 563 the district courts of the United States are given jurisdiction over offenses cognizable under the authority of the United States which are not capital.

By the act of February 24, 1863, organizing the Territory of Arizona (12 Stat. L., 664), the judicial power of the three judges of the supreme court therein created is the same as those conferred upon the same court by the act organizing the Territory of New Mexico.

The act organizing the Territory of New Mexico was passed September 9, 1850 (9 Stat. L., 446). By section 10 of that act it is provided that the supreme court shall consist of a chief justice and two associate justices, and that the Territory shall be divided into three judicial districts, that a district court shall be held in each of the districts by one of the justices of the supreme court, and that each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. By section 17 of the same act, the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the Territory of New Mexico as elsewhere within the United States.

The second section of the organic act of Arizona provides that all legislative enactments governing the Territory of

New Mexico not inconsistent with the provisions of the act are extended to and continued in force in the Territory of Arizona until repealed or amended by future legislation.

By section 1891 of the Revised Statutes, the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States.

From what has been said it is clear that the crime of murder committed within the Indian country, either by a man not an Indian, in killing either a man not an Indian or an Indian, or by an Indian in killing one not an Indian, is a crime against the United States, and therefore punishable in its courts.

In the case of *United States* vs. *McBratney* (104 U. S. R., 621) it was held that a murder committed by a white man in the killing of a white man within an Indian reservation in the State of Colorado was not triable in the courts of the United States, but that it should be tried in the courts of the State of Colorado.

The State was organized without excepting from its jurisdiction the Indian reservations within its geographical limits. It was held that the provision that the laws of the United States not locally inapplicable should have the same force and effect within the State as elsewhere in the United States, which was included within the act admitting Colorado as a State, did not create any such exception. The effect of that decision was that the State exercised jurisdiction throughout its geographical limits, except as to the Indians included in the reservation. The case, however, has no bearing upon the question of the juris-

diction of the Territorial courts over crimes committed within an Indian reservation within the Territorial limits.

Mr. Justice Gray, in the McBratney case, p. 623, says that the provision giving the laws of the United States not locally inapplicable the same force and effect as elsewhere within the United States has a less extensive effect within the limits of one of the States of the Union than within one of the Territories, within which the United States have sole and exclusive jurisdiction. The result is that the organization of the Territory and the creation of Territorial courts do not deprive the courts of the United States of jurisdiction over the Indian country within that Territory, because section 2145 is not locally inapplicable, nor is the creation of the Territory so inconsistent with that section as to repeal it in its application to Indian country within the Territory. It is conceded by counsel for the petitioner that until the passage of what is known as the Indian crimes act of 1885, all crimes committed within the Indian reservations in the Territory of Arizona were triable in the United States courts, whether those crimes were committed by Indians upon persons not Indians or by persons not Indians.

By the ninth section of the act of March 3, 1885 (23 Stats., 385), it is provided that after the passage of the act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to such crime, and shall be

tried therefor in the same courts, and in the same manner, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively.

It is claimed on behalf of the petitioner that, as the United States has hereby given over to the Territory a part of her jurisdiction over the offense of murder when committed on an Indian reservation, she has, therefore, lost all. It will be observed that before the passage of this act no court had any power to punish an Indian for killing another Indian. It was not a crime against the United States. Courts of the United States had jurisdiction to punish an Indian for killing a person not an Indian within an Indian reservation, and courts of the Territories had jurisdiction to punish an Indian for crimes committed without an Indian reservation. Courts of the United States had, as we have shown, exclusive power to punish a person not an Indian for killing either an Indian or a person not an Indian within an Indian reservation.

The effect of the act of 1885 is therefore, first, to make the felonious and malicious killing of one Indian by another in an Indian reservation within the territory the crime of murder against the Territory; secondly, to transfer the jurisdiction to try the crime of murder committed by an Indian upon a person not an Indian from the United States courts to the Territorial courts. In other respects the condition as to the jurisdiction is as it was before. It may seem incongruous that courts of the United States should retain jurisdiction to punish persons not Indians for committing crimes in the Indian country, while its jurisdiction to try Indians committing crimes in

that same Indian country is transferred to the Territorial courts, but such is the necessary result. *Ita lex scripta est.* Section 9 of the act of 1885 has no application whatever to any crimes except those committed by Indians, and there is no doubtful language from which the implication can arise that it was thereby intended to deprive the United States courts of jurisdiction to punish persons not Indians for crimes committed within the Indian country.

It is conceded that the indictment was found, the trial was had, and conviction and sentence followed in the district court of the Territory of Arizona, acting as a United States court, and therefore, if the crime was triable in the Territorial court, and not in a court exercising the judicial power of the United States, there was no jurisdiction in the court below to sustain the sentence herein. This follows from the decision in the case of *Ex parte Gonshay-ee* (130 U. S. R., 343). It is respectfully submitted, however, that the district court, sitting as a United States court, had jurisdiction to try a crime denounced as a crime against the United States by section 2145 of the Revised Statutes, committed within an Indian reservation, and therefore within the Indian country, if it was committed by a person not an Indian.

II.

The second ground urged on behalf of the petitioner for impeaching the validity of the sentence is that the grand jury which found the bill was not a legal grand jury under the laws of the Territory of Arizona. The law of Arizona in force until March 22, 1889, required

grand juries to be composed of not less than thirteen and not more than fifteen members. The contention by the petitioner is that on March 23, 1889, a law came into force by which the requisite number of members for a grand jury was increased, so as to be not less than seventeen and not more than twenty-three. The crime was committed in August, 1889, and the trial was had in May, 1890. The trial court decided the law first above mentioned to be in force, and that fifteen members made a lawful grand jury under the laws of Arizona.

(*a*) Before considering the correctness of this conclusion by the trial court, it is submitted that the question can not be here raised collaterally on habeas corpus. The constitutional requirement that no one shall be tried for a capital or otherwise infamous crime except upon indictment or presentment by a grand jury, does not specify the number required to constitute a grand jury. That is left to Congress or to the Territorial legislatures to settle. It is therefore a mere question of procedure under the law, and an error in deciding that question can certainly not deprive the court of jurisdiction to consider an indictment presented by what the court had power to decide was a legal grand jury. The case of *Ex parte Bain* (121 U. S. R., 1) has no application. There the court sought to exercise a power to amend an indictment after the grand jury was discharged. This court held that an indictment thus amended was not an indictment presented by a grand jury, and was not such a presentment as to empower the court to proceed to trial. The writ of habeas corpus issued, therefore.

Here no question is made but that the indictment was presented by a body purporting to act as a grand jury. The only point sought to be made is that it was not properly impaneled under the law. Beyond a doubt the district court of Arizona had the power and jurisdiction to determine what was the law of Arizona governing the impaneling of a grand jury, and so to decide what was a lawful grand jury. The court, it is conceded, has departed from the rule laid down in *Ex parte Tobias Watkins* (3 Peters, 193), where it was held that, on habeas corpus, the sentence of the trial court could only be impeached for a want of original jurisdiction apparent on the face of the record.

But it is respectfully submitted that it has not gone beyond considering on habeas corpus what may be called constitutional errors in the exercise of jurisdiction by the trial court. (*Ex parte Wilson* 114, U. S. 417, and cases there cited.) It will not interfere by habeas corpus unless it appears that the trial court either had no jurisdiction to inquire into the case and pronounce sentence, or that having jurisdiction, it so exercised it as to violate a plain right of the defendant secured to him by the Constitution of the United States. In the second case, the power of the court to proceed to sentence after such an unconstitutional course is said to be gone. What right secured to the petitioner by the Constitution was denied him? He was indicted by a grand jury. The Constitution does not say how many shall constitute that body. The number at common law was not less than twelve and not more than twenty-three. (Wharton's Pleading and Practice, ninth edition, section 341.) In many States it is but

fifteen. Confessedly fifteen was a lawful number in Arizona until 1889.

The only right, therefore, of which petitioner was deprived was not of an indictment by a grand jury, but of an indictment by a grand jury impaneled as a statute of Arizona requires. What that statute requires is a question of Territorial law, not of United States constitutional law, and an error in Territorial law can not be corrected in this court, except on a direct proceeding to review judgments of Territorial courts. The Territorial court had, if one may so express it, full power to make an error in construing Territorial law without fear of collateral question by any court. It is wholly immaterial

*The objection that the grand jury was not legal in number can not be made here, because it could not have been made on error. The record (Return, pages 8 and 9) shows that no objection was made at the trial to the fact that there were but fifteen members of the grand jury. This was because neither the court nor the public knew that the alleged jury act of 1889 had passed. It was not contained in the official publication of the Session Laws of 1889. However this may be, the objection to the composition of the grand jury in so far as its number was concern-*

defect in the proceeding as to warrant an investigation collaterally into the mode of impaneling it, we confidently submit that the law which was in force at the time that this trial was had required the grand jury to be of not less than thirteen and of not more than fifteen members, so that the jury as impaneled contained the requisite number of jurors. This is conceded to have been the law up to March 23, 1891, but it is said that upon that day a new law came into effect changing the requisite number and increasing it to seventeen.

This claim is based on a pamphlet issued by the secretary of the territory, purporting to contain a number of bills which passed the fifteenth assembly of Arizona, and which, as is said, became laws by non-action of the governor. The certificate of the secretary of the Territory and the alleged acts are contained in appendix, Exhibit B. It is to be noted that this alleged act is not contained in the official volume of Session Laws of Arizona passed by the fifteenth legislative assembly, the session of which in 1889 began on January 21, as therein appears. The certificate of the secretary in the appendix shows that the bill went to the governor on March 12, 1889.

It is open to serious question whether the fact that the act relied on passed the assembly is proved in such a way that the court may take cognizance of it. It can not be made out from the legislative journals.

But conceding the certificate of the secretary of the Territory to be correct, and that after passing both houses the act was placed in the hands of the governor of the Territory for his action on March 12, the 10 days (excluding Sundays) which was necessary to validate the bill

without his signature (act of Congress, July 19, 1876, 19 Stat. L., 91)—March 17 being Sunday—did not expire until 11 days thereafter, that is, until the 23d day of March. The legislature began its session on the 21st of January. By law, its session was limited to 60 days' duration. The 60 days from the 21st of January, including the day upon which the session began, would have expired on the 21st of March.

The claim on behalf of the United States is that, by virtue of the statute, the assembly was adjourned on the 21st of March, and, having thus adjourned before the expiration of the 10 days (Sundays excepted) within which the governor had power to sign the bill, the bill never became a law. The section involved in this discussion is section 1852, Revised Statutes of the United States, as amended by the act of Congress approved December 23, 1880 (21 Stat. L., 312), which reads as follows:

> The session of the legislative assemblies of the several Territories of the United States shall be limited to sixty days' duration.

Section 1852 was as follows:

> The sessions of the legislative assemblies of the several Territories of the United States shall be limited to forty days' duration.

The amendment simply increased the number of days from forty to sixty.

The first argument made by counsel for the petitioner to destroy the operation of the amended section quoted above is that the derivation of the section shows that the only purpose of the section was to limit the pay to be received by the members of the legislature from the Treas-

ury of the United States for their services, and that therefore it was not intended thereby to avoid all legislation passed by the assembly after the expiration of the time limited. In other words, the claim made is that the history of the section shows the language to be directory and not mandatory.

It is respectfully submitted that the argument finds no support in the derivation of the section. Counsel say that the section appeared first in the act of January 23, 1873, entitled "An act regulating the compensation of the members and officers of the legislative assemblies of the several Territories of the United States, and limiting the duration of the sessions of the said assemblies" (17 Stats., 416). This is true. One section is a limitation upon the duration of the sessions of the Territorial assemblies, and the other sections are a limitation upon the *per diem* which their members are to draw for their services.

If that were all the history of this section the argument under consideration might have some weight. An examination of the Congressional Globe, however, for the third session of the Forty-second Congress, part 1, page 411, shows that this act was a mere revision for the sake of uniformity of the various Territorial acts with similar provisions passed at the organization of the Territories. To find, therefore, the true connection in which the section limiting the duration of the Territorial assemblies is to be considered, reference must be had to the organic acts of the various Territories of which this act of 1873 is but a revision. It will be found in every instance that the section in which the duration of the assembly is limited is not the section fixing the *per diem* of the members of the

assembly, but is the section fixing the number of members which shall constitute each house of the assembly, describing the mode of apportionment, and imposing other absolute limitations upon the character of the assembly.

Thus in the act establishing the Territory of New Mexico (9 Stat., 448) the clause limiting the duration of sessions of the legislative assembly is to be found at the end of section 5, which vests the legislative power and authority of the Territory in the governor and a legislative assembly, consisting of a council and a house of representatives; states the number of the council, their qualifications, and their term of service; contains a similar description with reference to the house of representatives; provides for a census to be taken previous to the first election with a view to a subsequent apportionment, and then enacts that—

> Persons thus elected to the legislative assembly shall meet at such place and on such day as the governor shall appoint, but thereafter the time, place, and manner of holding and conducting all elections by the people, and the apportioning of the representation in the several counties and districts to the council and house of representatives according to the population shall be prescribed by law as well as the day of the commencement of the regular sessions of the legislative assembly, *provided that no one session shall exceed the term of forty days.*

The compensation of the members of the legislative assembly is fixed in section 12 of the act.

The same thing is exactly true of the act to establish a territorial government for Utah (9 Stats., 453), where the provision limiting the session to the term of forty days

is contained in section 4, and the provision for the compensation of the members of the legislative assembly is in section 11.

So, too, in the organic act of the Territory of Washington, approved March 2, 1853 (10 Stats., 172), section 4 covers the same ground as section 5 of the New Mexico act above quoted and contains the proviso at the end "that no session in any one year shall exceed the term of sixty days, except the first session, which shall not exceed one hundred days." The compensation of the members of the assembly is provided for in section 11 in connection with the salaries of other Territorial officers.

So in the organic act of the Territory of Colorado, passed February 28, 1861 (12 Stats., 172), section 4 contains provisions similar to those of section 5 of the New Mexico act. There is a proviso at the end as follows:

> Provided that no one session shall exceed the term of forty days, except the first, which may be extended to sixty days, but no longer.

The compensation of the members of the general assembly is fixed in section 11.

The same thing is true of the organic act for the Territory of Dakota (12 Stats., 239), the proviso being in exactly the same language as that of the Colorado act.

A similar statement may be made in respect to the organic act of Nevada (12 Stats., 209) and of Idaho (12 Stats., 808).

The organic act of Montana, passed May 26, 1864 (13 Stats., 85) is similarly framed, the proviso at the end of the fourth section being that "no session in any one

year shall exceed the term of forty days, except the first session, which may continue sixty days." The compensation of the members of the legislative assembly is to be found in section 10.

The organic act of Wyoming (15 Stat., 178), in section 4, makes provision similar to those in section 5 of the New Mexico act, and contains the proviso "that no one session shall exceed the term of 40 days, except the first, which may be extended to 60 days but no longer." A provision for compensation of the members of the assembly is contained in section 11.

And so, even at as late a day as May 2, 1890 (Pamphlet Laws, first session, Fifty-first Congress, p. 81), in the organic act of the Territory of Oklahoma, section 4 is quite like section 5 of the New Mexico act and contains a proviso as follows:

> The sessions of the legislative assembly shall be biennial, and shall be limited to sixty days' duration; provided, however, that the duration of the first session of the said legislative assembly may continue one hundred and twenty days.

The compensation of members of the legislative assembly is fixed in section 14.

It is obvious from the various acts quoted above that the limitation upon the duration of the session of the general assembly in the Revised Statutes and in all the Territorial acts is really a limitation upon the power of the assembly, and was not enacted merely for the purpose of limiting the compensation of the legislators. The language of section, 1852, in its original form and as amended in the provisos from which it was revised, is mandatory.

That is its ordinary meaning. "Shall be limited" does not mean "may be limited," and is not to be construed as merely directory, unless the circumstances surrounding its construction require such a modification of its ordinary meaning. The burden of showing the modification claimed is upon him who makes the claim.

Organic acts, in so far as they confer legislative power upon Territorial assemblies, are delegations of power, which are to be strictly construed. Even if they were to be liberally construed, it is not seen how the positive language of section 1852 is to be avoided. Suppose that the Constitution of the United States contained the provision that the sessions of Congress should be limited to six months' duration each year, is it possible that this court would recognize the validity of acts by Congress which on the face of the journals were passed more than six months after the session had begun? The form of the limitation excludes any other construction than that which makes it an absolute limitation upon the power of the Territorial assembly.

It may be noted that in the case of *Clough* v. *Curtis* and *Burkhardt* v. *Reed* (134 U. S., 361), the question of the effect of a session of a Territorial legislature of more than sixty days' duration was mooted, but was not decided by the court for the reason that no private right was concerned.

Coming now to the proper construction of section 1852, we must consider the contention by the petitioner that the provision that the session of the legislative assembly shall be limited to sixty days' duration means sixty legislative days, and is not a limitation of sixty

calendar days. The petitioner would exclude Sundays and all the days in which the legislature was not actually sitting, and so would extend its lawful session beyond the date when the jury act, upon which he relies, would have become law by the failure of the governor to act. The plain and ordinary meaning of sixty days' duration is during sixty calendar days. If the words are to have any other construction, it is for those making the contention to show it.

It is admitted by counsel for the petitioner that the compensation of the legislators continues during Sundays and the nonlegislative days exactly as during the days when the legislature is actually sitting. Now, it certainly must be admitted that legislators are not to be paid except while the legislature is in session. This shows beyond a doubt that the session of the legislature continues from its opening day to its adjournment, and that the recess taken by it over Sunday, or during holidays, does not prevent those intervening days from being days during which the session of the legislature continues.

Sundays are not to be excluded, because we find that where such exclusion was contemplated by Congress in the organic act it was expressly mentioned. Thus, by the act of July 19, 1876, relating to the approval of bills in the Territory of Arizona (19 Stats., 91), we find the provision that "if the governor shall not return any bill presented to him for approval within 10 days (*Sundays excepted*), after such presentation, the same shall become a law in like manner as if the governor had approved it; provided, however, that the assembly shall not have adjourned *sine die* during the 10 days prescribed as above, in which case

it shall not become a law." It is true that in court matters Sunday is a *dies non juridicus*, and therefore, in the calculation of time in court procedure, Sundays are excluded whenever that limitation of time concerns acts to be done in court, but the same rule does not affect other statutory limitations as to time.

In the case *Thayer* v. *Felt* (4 Pickering, 354), the supreme judicial court of Massachusetts lay down the distinction that where time limited is less than a week so that it need not necessarily include a Sunday, the implication ordinarily is that Sunday is to be excepted, but where the time limited exceeds a week, as Sunday must necessarily occur within the time limited, a failure to except Sundays leaves one to the ordinary construction that they are to be included in the days to be calculated. (See *Alderman* v. *Phelps*, 15 Mass., 225.)

The case of the *Provident Institution for Savings* v. *Burnham* (128 Mass., 458) has no bearing upon the present question. There the statute provided that no person should serve as a juror in the county of Suffolk for more than 30 days at any one term of court, and it was held that the 30 days there meant were 30 days of actual service. That was a case of a sitting of the court, and the juror was only paid for the days in which he sat. The statute was directed to the length of actual service and not to the period over which it extended. It was doubtless intended to give a juror exemption by reason of previous service on the jury. That would naturally be calculated upon the days he actually was engaged and not upon the period of time between his first and his last service.

Here the session is necessarily continuous. Here the pay of the legislators runs during every day from the opening of the session to its close. The question has been considered by the Attorney-General in 19 Attorney-General's Opinions, 259, to which reference is made. The construction of section 1852 depends upon the meaning of the word "session." As the Attorney-General points out in the opinion cited, Worcester defines the word to be "the time between the first meeting of an assembly and its prorogation or final adjournment." So in 2 Bouvier's Law Dictionary, 632, "session" is defined to be "the time during which a legislative body, a court or other assembly, sits for the transaction of business, as a session of Congress, which commences on the day appointed by the Constitution and ends when Congress finally adjourns before the commencement of the next session." So in Barclay's Digest of 1871, page 7, it is said "where the two Houses adjourn for more than 3 days and not to or beyond the period fixed by the Constitution or law for the next regular session, the session is not thereby terminated but continues until adjournment without day, or until the next regular session."

It is obvious therefore that the number of days in a session are the calendar days between the day of the first meeting and the day of the final adjournment. Therefore a limitation that the session was not to be longer than 60 days' duration limits the session to 60 calendar days, because during every one of the days the session is running.

We concede that the decision of the Supreme Court of Alabama in *Moog* v. *Randolph* (77 Ala., 597–608) sup-

ports the contention of the petitioner, but we respectfully dissent from that decision. It was there held that the session was limited to fifty legislative days, where the constitution provided that the general assembly should "not remain in session longer than 60 days at the first session nor longer than 50 days at any subsequent session." The trouble with the opinion is that it imposes no limitation whatever upon the power of the legislature to continue in session. A legislative day is well understood to be very different from a calendar day. The legislative day may by the action of the legislature itself continue for three or four calendar days or longer. In this way if "day" is to be given the meaning of "legislative day" the session of the legislature may be continued to such length as the assembly wishes, and the limitation would be nugatory.

For the reasons given it is respectfully submitted that the petition for the writ should be dismissed.

WM. H. TAFT,
*Solicitor-General.*

# APPENDIX.

## EXHIBIT A.

### WHITE MOUNTAIN OR SAN CARLOS RESERVE.

*(Formerly called White Mountain or Camp Apache Reserve.)*

ENGINEER'S OFFICE,
HEADQUARTERS MILITARY DIVISION
OF THE PACIFIC,
*San Francisco, Cal., January* 31, 1870.

SIR: I respectfully forward the following description of the proposed Indian Reservation in Arizona, the boundaries of the reservation to be as follows, as shown in red on the accompanying map: Starting at the point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and following the southern edge of the Black Mesa to a point due north of Sombrero or Plumoso Butte; then in the direction of the Picache Colorado to the crest of the Apache Mountains, following said crest down the Salt River to Pinal Creek, and then up the Pinal Creek to the top of the Pinal Mountains; then following the crest of the Pinal range, "the Cordilleras de la Gila," the "Almagra Mountains," and other mountains bordering the north bank of the Gila River to the New Mexican

boundary near Steeple Rock; then following said boundary north to its intersection with the south edge of the Black Mesa, the starting point.

H. M. ROBERT,
*Major Engineers.*

Gen. W. D. WHIPPLE,
*Adjutant-General, Military Division of the Pacific.*

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DEPARTMENT OF THE INTERIOR,
BOARD OF INDIAN COMMISSIONERS,
CAMP APACHE, ARIZONA T., *September* 5, 1871.

SIR: As the White Mountain region has been set apart by the War Department as an Indian reservation, and there are several bands of peaceably disposed Apaches, who have for many years lived in this country, who can not be be removed without much suffering to themselves, risk of war, and expense to the Government, I have concluded to select the White Mountain Reservation, the boundaries of which were defined in letter of H. M. Robert, major of Engineers, dated Headquarters Military Division of the Pacific, San Francisco, Cal., January 31, 1870, as one of the Indian reservations upon which the Apache Indians of Arizona may be collected, fed, clothed, and otherwise provided for and protected, agreeable to the power conferred upon me at the suggestion of the President by the honorable Secretary of the Interior, under date July 21, 1871, and supplementary orders July 31, 1871, copies of which are herewith inclosed.

Agreeable to your wish that I should name the articles and amount of provisions to be issued, I would suggest that 1 pound of beef and 1 pound of corn per capita be issued with salt daily, and sugar and coffee occasionally.

Very respectfully, your obedient servant,
VINCENT COLYER, *Commissioner.*

Lieut. Col. JOHN GREEN,
*First Calvary, U. S. A., Commanding,*
*Camp Apache, Arizona Territory.*

DEPARTMENT OF THE INTERIOR,
BOARD OF INDIAN COMMISSIONERS,
*Washington, D. C., November 7, 1871.*

SIR: Reservations for the roving Apache Indians of New Mexico and Arizona were selected under your instructions of 21st July, 1871, as follows:

For the Mimbres and Coyoteros, at Tularosa Valley,* in New Mexico. (See accompanying paper, A.)

For the Coyoteros and Chiloccos of Arizona, at Camp Apache, in White Mountains, Arizona. (See Appendix B.)

For the Arrivapis and Pinals, at Camp Grant, Arizona. (See Appendix C and accompanying map.)

For the Mohavé Apaches, at Camp Verde, Arizona. (See Appendix D.)

A detailed description of the Camp Apache Reservation, which was established by Major-General Thomas, will be found on file in the War Department.

I also requested, with the advice of General Crook and the several post commanders, that temporary asylums, where the Tontos, Hualapais, and Western band of Apache Mohaves might be protected and fed, should be established at Camp McDowell, Beal Spring, and Date Creek until such times as the Indians collected there could be removed to the above reservations.

Very respectfully, etc.,

VINCENT COLYER.

Hon. C. DELANO,
*Secretary of the Interior, Washington, D. C.*

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DEPARTMENT OF THE INTERIOR,
*Washington, D. C., November 7, 1871.*

SIR: I have the honor to transmit herewith a copy of a communication addressed to this Department by the

* For the Executive order setting apart Tularosa Valley Reserve see New Mexico.

Hon. Vincent Colyer, one of the board of Indian peace commissioners who recently visited Arizona, wherein he states his views in relation to the Apache Indians, and describes certain tracts of country in Arizona and New Mexico which, during his recent visit to said Indians, he has selected to be set apart as reservations for their use, as authorized to do by orders issued to him before visiting the Apaches.

I have the honor to recommend, in pursuance of the understanding arrived at in our conversation with the Secretary of War on the 6th instant, that the President issue an order authorizing said tracts of country described in Mr. Colyer's letter to be regarded as reservations for the settlement of Indians until it is otherwise ordered. * * *

I would further suggest that the War Department will, for the present, select some suitable and discreet officer of the Army to act as Indian agent for any of the reservations in Arizona which may be occupied by the Indians, under the order herein contemplated. Such agents will be superseded by persons hereafter appointed by this Department, at such times as the President may hereafter deem proper.

Very respectfully, your obedient servant,

C. DELANO,
*Secretary.*

The PRESIDENT.

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These recommendations were approved by the President, as follows:

EXECUTIVE MANSION,
*Washington, D. C., November* 9, 1871.

Respectfully referred to the Secretary of War, who will take such action as may be necessary to carry out the recommendations of the Secretary of the Interior.

U. S. GRANT.

And indorsed by General Sherman thus:

HEADQUARTERS ARMY OF THE UNITED STATES,
*Washington, D. C., November 9, 1871.*

GENERAL: I now inclose you copies of a correspondence between the Secretary of the Interior and War Department on the subject of the policy that is to prevail in Arizona with the Apache Indians. The Secretary of War wishes you to give all the necessary orders to carry into full effect this policy, which is the same that prevails in the Indian country generally, viz, to fix and determine (usually with the assent, expressed or implied, of the Indians concerned) the reservation within which they may live and be protected by all branches of the Executive Government; but if they wander outside they at once become objects of suspicion, liable to be attacked by the troops as hostile. The three reservations referred to in these papers, and more particularly defined in the accompanying map, seem far enough removed from the white settlements to avoid the dangers of collision of interest. At all events these Indians must have a chance to escape war, and the most natural way is to assign them to homes and to compel them to remain thereon. While they remain on such reservations there is an implied condition that they should not be permitted to starve, and our experience is that the Indian Bureau is rarely supplied with the necessary money to provide food, in which event you may authorize the Commissary Department to provide for them, being careful to confine issues only to those acting in good faith, and only for absolute wants.

The commanding officer of the nearest military post will be the proper person to act as the Indian agent until the regular agents come provided with the necessary authority and funds to relieve them; but you may yourself, or allow General Crook to appoint these temporary agents regardless of rank.

The citizens of Arizona should be publicly informed of these events, and that the military have the command of the President to protect these Indians on their reservations, and that under no pretense must they invade them, except under the leadership of the commanding officer having charge of them.

The boundaries of these reservations should also be clearly defined, and any changes in them suggested by experience should be reported, to the end that they may be modified or changed by the highest authority.

After general notice to Indians and whites of this policy General Crook may feel assured that whatever measures of severity he may adopt to reduce these Apaches to a peaceful and subordinate condition will be approved by the War Department and the President.

I am, your obedient servant,

W. T. SHERMAN,
*General.*

Gen. J. M. SCHOFIELD,
*Commanding Military Division Pacific.*

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EXECUTIVE MANSION,
*December* 14, 1872.

It is hereby ordered that the following tract of country be, and the same is hereby, withheld from sale and set apart as a reservation for certain Apache Indians in the Territory of Arizona, to be known as the "Chiricahua Indian Reservation," viz:

Beginning at Dragoon Springs, near Dragoon Pass, and running thence northeasterly along the north base of the Chiricahua Mountains to a point on the summit of Peloncillo Mountains or Stevens Peak range; thence running southeasterly along said range through Stevens Peak to the boundary of New Mexico; thence running south to the boundary of Mexico; thence running west-

erly along said boundary 55 miles; thence running northerly, following substantially the western base of the Dragoon Mountains, to the place of beginning.

It is also hereby ordered that the reservation heretofore set apart for certain Apache Indians in the said Territory, known as the "Camp Grant Indian Reservation," be, and the same is hereby, restored to the public domain.

It is also ordered that the following tract of country be, and the same is hereby, withheld from sale and added to the White Mountain Indian Reservation in said Territory, which addition shall hereafter be known as the "San Carlos division of the White Mountain Indian Reservation," viz:

Commencing at the southeast corner of the White Mountain Reservation as now established, and running thence south to a line 15 miles south of and parallel to the Gila River; thence west along said line to a point due south of the southwest corner of the present White Mountain Reservation; thence north to the said southwest corner of the aforesaid White Mountain Reservation, and thence along the southern boundary of the same to the place of beginning; the said addition to be known as the "San Carlos division of the White Mountain Reservation," which will make the entire boundary of the White Mountain Reserve as follows, viz:

Starting at the point of intersection of the boundary between New Mexico and Arizona with the south edge of the Black Mesa, and following the southern edge of the Black Mesa to a point due north of Sombrero or Plumoso Butte; thence due south to said Sombrero or Plumoso Butte; thence in the direction of the Piache Colorado to the crest of the Apache Mountains, following said crest down the Salt River to Pinal Creek to the top of the Pinal Mountains; thence due south to a point 15 miles south of the Gila River; thence east with a line parallel with and 15 miles south of the Gila River to the bound-

ary of New Mexico; thence north along said boundary line to its intersection with the south edge of the Black Mesa, the place of beginning.

U. S. GRANT.

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DEPARTMENT OF THE INTERIOR,
*Washington, D. C., July 30, 1873.*

Respectfully submitted to the President, with the recommendation that all that portion of the valley of the Gila River in the Territory of Arizona hitherto included in the San Carlos division of the White Mountain Indian Reservation as established by Executive order dated December 14, 1872, lying east of and above the site of old Camp Goodwin, be restored to the public domain, as recommended by the Acting Commissioner of Indian Affairs.

B. R. COWEN,
*Acting Secretary.*

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EXECUTIVE MANSION, *August 5, 1873.*

Agreeable to the above recommendation of the Acting Secretary of the Interior, it is hereby ordered that the land therein described be restored to the public domain.

U. S. GRANT.

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EXECUTIVE MANSION, *July 21, 1874.*

It is hereby ordered that all that portion of the White Mountain Indian Reservation in Arizona Territory lying east of 109 degrees 30 minutes west longitude be restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *April* 27, 1876.

It is hereby ordered that all that portion of the White Mountain Indian Reservation in Arizona Territory lying west of the following-described line, viz: Commencing at the northwest corner of the present reserve, a point at the southern edge of the Black Mesas due north of Sombrero or Plumoso Butte; thence due south to said Sombrero or Plumoso Butte; thence southeastwardly to Chromo Peak; thence in a southerly direction to the mouth of the San Pedro River; thence due south to the southern boundary of the reservation, be, and the same hereby is, restored to the public domain.

U. S. GRANT.

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EXECUTIVE MANSION, *January* 26, 1877.

It is hereby ordered that all that portion of the White Mountain Indian Reservation in Arizona Territory lying within the following-described boundaries, viz: Commencing at a point known as corner I of survey made by Lieut. E. D. Thomas, Fifth Cavalry, in March, 1876, situated northeast of, and 313 chains from, flagstaff of Camp Apache, magnetic variation 13 degrees 48 minutes east; thence south 68 degrees 34 minutes west 360 chains to corner II, post in monument of stones, variation 13 degrees 45 minutes east; thence south 7 degrees 5 minutes west 240 chains to corner III, post in monument of stones, variation 13 degrees 43 minutes east; thence north 68 degrees 34 minutes east 360 chains to corner IV, post in monument of stones, magnetic variation 13 degrees 42 minutes east; thence north 7 degrees 15 minutes east 240 chains to place of beginning, comprising 7,421.14 acres, be restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *March* 31, 1877.

It is hereby ordered that all that portion of the White Mountain Indian Reservation, in the Territory of Arizona, lying within the following-described boundaries be, and the same hereby is, restored to the public domain, to wit: Commencing at a point at the south bank of the Gila River, where the San Pedro empties in the same; thence up and along the south bank of said Gila River 10 miles; thence due south to the southern boundary of the said reservation; thence along the southern boundary to the western boundary thereof; thence up said western boundary to the place of beginning.

R. B. HAYES.

## EXHIBIT B.

### CERTIFICATE.

TERRITORY OF ARIZONA,
*Office of the Secretary, ss:*

I, Nathan O. Murphy, secretary of the Territory of Arizona, do hereby certify that the acts herein contained are printed as passed by the fifteenth legislative assembly of the Territory of Arizona, according to the enrolled copies on file in my office.

Witness my hand and seal of the Territory of Arizona, given at Phœnix, this thirteenth day of December, A. D. eighteen hundred and ninety.

[SEAL.] NATHAN O. MURPHY,
*Secretary of Territory.*

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### ACTS.

AN ACT to amend chapter 1, title 4, entitled "Attachments and garnishments," Revised Statutes of Arizona, 1887.

*Be it enacted by the Legislative Assembly of the Territory of Arizona:*

Section 1, paragraph 40 being section 1, chap. 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

The plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the de-

fendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment as in this act provided in the following cases:

First. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this Territory, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property.

Second. When any suit be pending for damages the defendant is about to dispose of or remove his property beyond the jurisdiction of the court in which the action is pending for the purpose of defeating the collection of the judgment.

Third. In an action upon a contract, express or implied, against a defendant not residing in this Territory or a foreign corporation doing business in this Territory.

Sec. 2, paragraph 41, being section 2, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended so as to read as follows:

41 (Sec. 2). The clerk of the court or justice of the peace must issue the writ of attachment upon receiving an affidavit by or on behalf of plaintiff showing.

First. That the defendant is indebted to the plaintiff upon a contract, express or implied, for the direct payment of money and that such contract was made or is payable in this Territory, and that the payment of the same has not been secured as provided in section 1 of this act, and shall specify the character of the indebtedness; that same is due to plaintiff over and above all legal set-offs or counter claims; or,

Second. That the defendant is indebted to the plaintiff, stating the amount and character of the debt; that the same is due over and above all legal set-offs and counterclaims, and that the defendant is a non-resident of this Territory or is a foreign corporation doing business in this Territory; or,

Third. That an action is pending between the parties, and that defendant is about to remove his property beyond the jurisdiction of the court to avoid payment of the judgment; and,

Fourth. That the attachment is not sought for wrongful or malicious purpose, and the action is not prosecuted to hinder or delay any creditor of the defendant.

Sec. 3, paragraph 43, being section 4, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby repealed.

Sec. 4, paragraph 47, being section 8, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by striking out the word "original" where it occurs in the first line of said section.

Sec. 5, paragraph 50, being section 11, chapter 1, title 4, Revised Statutes of Arizona, 1887, is hereby amended by striking out the word "repleviable" where it occurs in line five of said section.

SEC. 6. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

This bill having remained with the governor ten days, Sundays excluded, and the legislature having been in session during that time, became a law the second day of April, A. D. 1889.

N. O. MURPHY,
*Secretary of Territory.*

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AN ACT prohibiting the carrying on of certain business within the limits of incoporated cities on Sunday.

*Be it enacted by the legislative assembly of the Territory of Arizona:*

SECTION 1. Every person who keeps open on Sunday, within the limits of any incorporated city in the Territory of Arizona, any store, workshop, bar, saloon, bank-